139-591

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1609. 1155

A. SHELTON, SHERIFF, AND S. D. CATE, DEPUTY SHERIFF, OF HAMILTON COUNTY, TENNESSEE, APPELLANTS,

vs.

Thomas C. Platt as President of
THE UNITED STATES EXPRESS COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

FILED APRIL 14, 1890.

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INDEX.

	Original.	Print.
Prosecution bond	1	1
Original bill	2	1
Order of Judge Key on bill	9	5
Restraining order to Comptroller Allen	10	5
Restraining order to Shelton and Cate	12	6
Subpœna to Comptroller Allen	13	7
Subpœna to Shelton and Cate	16	8
Plea in abatement	18	9
Motion to dismiss	19	10
Amended bill of complaint	21	11
Exhibit A—Statement of business within the State of Tennessee from September, 1887, to August, 1889, inclusive	35	19
Opinion of Judge Key	36	19
Injunction bond	42	22
Injunction	43	23
Answer of Shelton and Cate	45	24
Replication	48	26
Appeal bond	50	27
Order granting leave to file amended bill	52	27
Order for injunction	52	28
Order of dismissal as to Comptroller Allen	53	28
Order of dismissal as to Comptroller Allen	54	29
Order to strike out plea, &c.	54	29
Motion of Shelton and Cate to dismiss as to them	54	29
Order denying motion of Shelton and Cate to dismiss	55	29
Final decree	55	30
Allowance of appeal	55	30
Clerk's certificate	56	30

JUDD & DETWEILER, PRINTERS, WASHINGTON, APRIL 16, 1890

1 *Prosecution Bond. Filed 6 Day of September*, 1889.

In the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

UNITED STATES EXPRESS COMPANY
vs.
J. W. ALLEN, Comptroller, *et als.* } # 206.

Know all men by these presents that we, United States Express Company, R. L. Bright, and T. H. Walker, are held and firmly bound unto J. W. Allen, comptroller; A. Shelton, sheriff, and S. D. Cate, deputy sheriff, in the penal sum of two hundred and fifty dollars; to the payment whereof we bind ourselves and each of us and each and every of our several heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands on this the 6th day of September, 1889.

The condition of this bond is such that the said United States Express Company commenced suit against J. W. Allen for — in equity.

Now, if the said United States Express Company shall prosecute said suit with effect or on failure thereof pay and satisfy all costs that may be adjudged against said plaintiff in said cause, or on failure of said defendant, if convicted, to pay and satisfy said costs, if the said plaintiff shall pay the same, then this bond to be void; otherwise to remain in full force and virtue.

UNITED STATES EXPRESS COMPANY, [SEAL.]
By R. L. BRIGHT, *Att'y.*
R. L. BRIGHT, *Surety.* [SEAL.]
T. H. WALKER, *Surety.* [SEAL.]

Attest: —— ——.

2 *Original Bill. Filed Sept. 6th*, 1889.

Thomas G. Platt, of the city of New York and a citizen of the State of New York, brings this bill against J. W. Allen, A. Shelton, and S. D. Cate, the first a citizen of Davidson county, Tennessee, and the last two are citizens of Hamilton county, Tennessee.

And thereupon your orator complains and says that he is president of the United States Express Company, a joint-stock company organized under the constitution and statute laws of the State of New York (see Code of Civil Procedure, section 1919, and article 8 — constitution of New York, and —) and domiciled in the State of New York and authorized by said laws to sue in the name of its president, and that said company's principal office in the State of Tennessee is located in the city of Chattanooga, in the southern division of the eastern district of Tennessee.

That defendant, J. W. Allen, is comptroller of the State of Tennessee, having his office in the city of Nashville, and by virtue of

his office is alone authorized to demand and receive privilege taxes assessed by the Legislature of Tennessee against express companies doing business in the State.

Your orator further states that the said express company, of which he is president, has been for some time past and is still engaged in carrying on an express business consisting of receiving and forwarding upon and by means of railroads, steam vessels, and other vehicles of transit, in a safe and careful manner and with the
3 greatest practicable expedition, in the special care and custody of its own employees, and at the places of destination personally delivering packages of money or currency, gold, silver, bills, bonds, and other valuable papers, jewels and other articles of great value, and every variety of goods, wares, and merchandise, live animals, fish, oysters, provisions, and fruits of every kind—in short, every article that enters into and forms a part of the trade and commerce of the country—and receiving and returning the proceeds thereof.

That by said business it affords to the public, under a single contract and on assured responsibility, reliable and speedy transportation from all to all points accessible and over and by means of railroads, steamships, steamboats, and other vehicles, and generally such service in that business aforesaid as cannot be conveniently or successfully performed by common carriers.

That said business is mainly in carrying on such commerce between the several States of the United States, in conducting which, however, said company is compelled to have and has offices and agents or clerks at several places in the State of Tennessee, the principal office being at Chattanooga, as aforesaid, and such business unites in a smaller degree and to an incertain and undeterminate amount and as an incident thereto the carrying and delivering such articles as are hereinbefore enumerated and the rendering such services between points wholly within the State of Tennessee. Indeed, the articles transported from and to points entirely within the State of Tennessee are almost insignificant in comparison with those articles transported beyond the limits of the State, and fall
4 within the classification of the interstate commerce.

Your orator will now show that by the act of the Legislature of the State of Tennessee, 1887, there was a tax assessed upon express companies for the privilege of doing business in the State of Tennessee as follows: "In lieu of all other taxes except ad valorem tax." "If the lines are less than 100 miles long, per annum, $1,000." "If the lines are over 100 miles long, per annum, $3,000." "The above tax only applies to express companies running or doing business on cars or steamboats, etc."

This is the whole of the act relating to the tax on the privilege of express companies in said act of 1887.

Under the laws of Tennessee, as shown by section 617 of the compilation of code of Milliken & Vertrees, these taxes are payable directly to the comptroller of the State. Under said laws, as further shown by section 871 of said compilation or code (Mil. & Ver.), should any person be proceeded against by an officer charged with

the collection of the public revenue for failing to pay the revenue due to the State or county, such person shall not be permitted to transact or carry on the business for the violation of the law for which he or they have been proceeded against; and, as shown by section 871 of same, for such violation of the law it is made a misdemeanor punishable by a fine of $100.00 and imprisonment for a period not exceeding twenty days.

Your orator would now show that the defendant, J. W. Allen, in his official capacity of comptroller of the State of Tennessee, on or about the 5th day of August, 1889, issued his distress warrant, addressed to defendant, A. Shelton, sheriff of Hamilton county,
5 Tennessee, ordering and empowering and commanding — in the name of the State of Tennessee to distrain and seize of the goods and chattels and property of said United States Express Company enough to satisfy the privilege tax of $3,000 and interest and cost and charges for the year 1887, and $3,000 and interest and cost for the year 1888, and to sell said property as other property of like character sold for taxes.

And that said distress warrant was placed in the hands of defendant, S. D. Cate, who is the deputy sheriff of said county of Hamilton, and who has proceeded to seize and distrain the goods and chattels of said United States Express Company, and he is about to sell said property to satisfy the aforesaid taxes claimed by the State of Tennessee, and will sell the same unless restrained by your honor.

Your orator would further show that under the recent statute of the State of Tennessee passed 5 April, 1889, section 5, chapter 130, pp. 265, '6, Acts of Tennessee, 188–9, the privilege of doing business as an express company in the State of Tennessee was taxed as follows: "In lieu of all other taxes except ad valorem tax." "If the lines are less than 100 miles long, for one or more packages taken up at one point in this State and transported to another point in this State, per annum, $1,000.00." "If the lines are more than 100 miles long, for one or more packages taken up at one point in this State and transported to another point in this State, per annum, $3,000.00." "The above tax only applies to express companies running or doing business on cars or boats, etc."

By this same section this tax is to be paid directly to the comptroller of the State, and the delinquent tax-payers under this
6 act are subject to the same fine and punishment as before recited.

Your orator would show that the United States Express Company, about the first of September, 1887, assumed by purchase the operation of the line of the Baltimore & Ohio Express Company; but before said purchase the Baltimore & Ohio Express Company paid to the State of Tennessee the privilege tax of $3,000 for the year 1887, and your orator submits to the court whether such payment is not a full satisfaction of the privilege tax for 1887.

Your orator would now show that the line of said express company is greatly more than 100 miles long, and extends through many of the States of the United States besides the State of Tennessee, from the city of New York, on the Atlantic coast, to the city

of New Orleans, on or near the Gulf of Mexico; but said statute of 1887, of the State of Tennessee, levies its privilege tax on the whole line of the company, passing through other States as well as its own territorial limits.

Your orator is advised that said act of 1887, of the State of Tennessee, is an attempt to regulate commerce and is violative of and repugnant to the clause of the Constitution of the United States which confers on Congress the "power to regulate commerce with foreign nations and among the several States," and that said privilege tax of $3,000 or any other sum, under the statute, cannot be enforced against the said express company, and that said statutes of the State are equally repugnant to the Constitution of the United States so far as they denounce penalties and punishment against this company or any of its officers or agents as defaulting taxpayers.

7 Your orator is further advised that said statute of Tennessee of April 5th, 1889, so far as it seeks to impose a privilege tax of $3,000.00 on said express company, is also repugnant to and violative of the before-recited clause of the Constitution of the United States.

While it changes the verbiage of the former act of 1887 above recited, it still retains the burden of the tax.

To show the delusive operation of such a tax your orator would state that said express company has only a short portion of its lines and two or three unimportant offices or agencies in the State of Tennessee outside of the office at Chattanooga, and the entire gross earnings of the company's business for the transportation of packages from one point in the State to another point in the State will not pay the tax exacted by the State for carrying on the business. If all the States through which this express company passes were to pursue a similar oppressive policy the business of the company might be entirely destroyed.

This company not receiving net profits enough for packages transmitted from point to point within the State of Tennessee to pay said tax of $3,000.00, the incidence of the tax must fall on the receipts or profits of the company for business outside the limits of the State.

Your orator is further advised that both of the aforesaid statutes of the State of Tennessee imposing said taxes, as well as said penal statutes, have a tendency to clog, obstruct, and embarrass the commerce between the States, and they are therefore violative of the Constitution of the United States and void as to the United States Express Company, of which your orator is president.

8 The premises considered, your orator prays that said J. W. Allen, comptroller of the State of Tennessee; A. Shelton, and S. D. Cate be made defendants and required to answer this bill according to the rules of this court; that proof be taken, and that meanwhile the defendants may be restrained by injunction from enforcing or attempting to collect said privilege taxes under either one of said acts, and from enforcing or attempting to enforce said act inflicting fines and personal punishment in default of payment

of said taxes, and that said acts be declared void as to the United States Express Company, and that on the final hearing said injunction be made perpetual.

Or, if mistaken in the relief prayed for, your orator prays for such other, further, or general relief as may be equitable in the premises.

Your orator also prays for writs of subpœna and injunction, directed, etc., commanding, etc.; and, — in duty bound, &c.

JOHN M. BRIGHT,
R. L. BRIGHT,
RUSSELL & DANIELS,
Sol's for Plaintiff.

9 Personally appeared before me T. H. Walker, superintendent of the United States Express Company, complainant in the foregoing bill, and makes oath that the statements contained in the foregoing bill which are stated as facts are true, and the statements contained in the foregoing bill as upon information and belief he believes to be true.

T. H. WALKER.

Subscribed and sworn to before me this 4th day of Sept., 1889.

HENRY O. EWING,
Deputy Clerk.

To the clerk of the circuit court of the United States, Chattanooga, Tennessee:

Upon complainant executing bond for costs as required by law you will issue an order restraining the defendants from taking any further steps to collect the taxes mentioned in this bill until further order. The clerk will notify the parties or their solicitor to appear at the court-house, in Chattanooga, Tennessee, on the 19th day of September, 1889, at 10 o'clock a. m., to show cause why an injunction may not issue as prayed for. The complainant has leave to dismiss the bill heretofore filed by him against the parties herein. This the 5th day of Sept., 1889.

D. M. KEY, *Judge, &c.*

10 *Restraining Order. Filed Sept. 12th,* 1889.

Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee, *ss:*

The President of the United States of America to J. W. Allen, comptroller of the State of Tennessee, and to his counsellors, attorneys, solicitors, and agents and each and every of them, Greeting:

Whereas it has been represented to us, in our said court of chancery, on the part of the United States Express Company, complainant, that they have this day exhibited their bill of complaint in the circuit court of the United States for the sixth circuit against you, the said J. W. Allen, comptroller of the State of Tennessee, to

be relieved touching the matters therein complained of, in which bill it is stated, among other things, that you are combining and confederating with others to injure the said complainant touching the matters set forth in said bill, and that your actings and doings in the premises are contrary to equity and good conscience:

We therefore, in consideration thereof and of the particular matters in the said bill set forth, do strictly command you, the said J. W. Allen, and the persons before mentioned, and each and every of you, under the penalty of the law, that you do absolutely desist and refrain from attempting to collect said taxes mentioned in the bill until our said court shall have made further order thereupon.

To the marshal of the middle district of Tennessee to execute.

11 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Chattanooga, Tennessee, this sixth day of September, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the 114th.

[SEAL.] HENRY O. EWING,
Deputy Clerk.

(Endorsed:) Executed by making known contents hereof to J. W. Allen, comptroller of the State of Tennessee, this 9th September, 1889. C. H. Harrison, U. S. M., by E. R. Campbell.

12 *Restraining Order. Issued Sept. 6th*, 1889. *Filed Sept. 9th*, 188–.

Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee, *ss:*

The President of the United States of America to A. Shelton and S. D. Cate and to their counsellors, attorneys, solicitors, and agents and each and every of them, Greeting:

Whereas it has been represented to us, in our said court of chancery, on the part of the United States Express Company, complainant, that they have heretofore exhibited their bill of complaint in the circuit court of the United States for the sixth circuit against you, the said A. Shelton and S. D. Cate, to be relieved touching the matters therein complained of, in which bill it is stated, among other things, that you are combining and confederating with others to injure the said complainant touching the matters set forth in said bill, and that your actings and doings in the premises are contrary to equity and good conscience:

We therefore, in consideration thereof and of the particular matters in the said bill set forth, do strictly command you, the said A. Shelton and S. D. Cate, and the persons before mentioned and each and every of them, under the penalty of the law, that you do absolutely desist and refrain from attempting to collect said taxes mentioned in the bill until our said court shall have made further order thereupon.

To the marshal of the eastern district of Tennessee to execute.

Witness the Honorable Melville W. Fuller, Chief Justice of
13 the Supreme Court of the United States, at Chattanooga, Tennessee, this sixth day of September, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the 114th.

HENRY O. EWING,
[SEAL.] *Deputy Clerk.*

(Endorsed:) Came to hand Sept. 7th, 1889, and executed as commanded by reading and making known to A. Shelton and S. D. Cate the contents of this restraining order. 1889, Sept. 9th. Samuel Hughes, dep't- U. S. marshal. Cost: 2 services, $4.00.

Chancery Subpœna. Filed Sept. 12th, 1889.

UNITED STATES OF AMERICA,
Southern Division of the Eastern District of Tennessee, } *ss:*

The United States of America to J. W. Allen, comptroller, Greeting:

We command you and every one of you that you appear before our judge of our circuit court of the United States of America for the southern division of the eastern district of Tennessee, at Chattanooga, in said district, on the first Monday of October next, that being the rule day to which this writ of subpœna is returnable, to answer the bill of complaint of United States Express Company this day filed in the clerk's office of said court, in said city of Chattanooga, then and there to receive and abide by such judgment
14 and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the middle district of Tennessee to execute.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Chattanooga aforesaid, this 6th day of September, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the 114th.

—— ——, *Clerk,*
By HENRY O. EWING,
Deputy Clerk.

MEMORANDUM.—The above-named defendants *is* notified that unless *he* enters *his* appearance in the clerk's office of said court, at Chattanooga aforesaid, on or before the day to which the above writ is returnable the complaint will be taken against *him* as confessed and a decree entered accordingly.

—— ——, *Clerk,*
[SEAL.] By HENRY O. EWING,
Deputy Clerk.

Circuit Court of the United States of America, Southern Division of the Eastern District of Tennessee, *ss:*

UNITED STATES EXPRESS COMPANY *vs.* J. W. ALLEN *et als.* } In Chancery. —— Term, A. D. 188–.

15 To J. W. Allen, comptroller:

Take notice that the complainant will move this honorable court on the 19th day of September, at the going in of the court on that day, or as soon thereafter as counsel can be heard, that a writ of injunction issue against the within-named defendant, J. W. Allen, in accordance with the prayer of the bill herein.

Yours, etc., HENRY O. EWING, *Deputy Clerk.*

Dated this 6th day of Sept., A. D. 1889.

(Endorsed:) Executed by making known contents of this subpœna to answer to defendant, J. W. Allen, comptroller of the State of Tennessee, and at same time delivering to him a true copy of said spa. to answer and a copy of complainant's bill. This Nashville, Tenn., 9th September, 1889. C. B. Harrison, U. S. mar., by E. R. Campbell, deputy. Original. No. 206. Circuit court of the United States, southern division of the eastern district of Tenn. United States Express Company *vs.* J. W. Allen *et als.* Chancery subpœna. Returnable to rule day in October, A. D. 1889. Henry O. Ewing, D. C. Issued Sept. 6th, A. D. 1889. Henry O. Ewing, dep. clerk, Davidson county.

16 *Chancery Subpœna. Filed* 1889, *Sept. 9th.*

UNITED STATES OF AMERICA, *Southern Division of the Eastern District of Tennessee,* } *ss:*

The United States of America to A. Shelton, sheriff; Sam. D. Cate, dep. sheriff, Greeting:

We command you and every one of you that you appear before our judge of our circuit court of the United States of America for the southern division of the eastern district of Tennessee, at Chattanooga, in said district, on the first Monday of October next, that being the rule day to which this writ of subpœna is returnable, to answer the bill of complaint of United States Express Company this day filed in the clerk's office of said court, in said city of Chattanooga, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the eastern district of Tennessee to execute.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Chattanooga aforesaid, this 6th day of September, in the year of our Lord one

thousand eight hundred and eighty-nine, and of our Independence the 114th.

—— ——, *Clerk*,
By HENRY O. EWING,
Deputy Clerk.

MEMORANDUM.—The above-named defendants are notified
17 that unless they enter their appearance in the clerk's office of said court, at Chattanooga aforesaid, on or before the day to which the above writ is returnable the complaint will be taken against them as confessed and a decree entered accordingly.

—— ——, *Clerk*,
[SEAL.] By HENRY O. EWING,
Deputy Clerk.

Circuit Court of the United States of America, Southern Division of the Eastern District of Tennessee, *ss:*

UNITED STATES EXPRESS COMPANY *vs.* J. W. ALLEN *et als.* } In Chancery. April Term, A. D. 1889.

To A. Shelton, S. D. Cate:

Take notice that the complainant will move this honorable court on the 19th day of Sept., at the going in of the court on that day, or as soon thereafter as counsel can be heard, that a writ of injunction issue against the within-named defendants in accordance with the prayer of the bill herein.

Yours, etc., HENRY O. EWING,
Deputy Clerk.

Dated this 6th day of September, A. D. 1889.

(Marshal's endorsement:) Came to hand when issued, and executed as commanded by reading and making known to the within-named A. Shelton aud S. D. Cate the contents of this subpœna and leaving with each of them a copy of this subpœna and a copy of the bill, at Chattanooga, Sept. 7th, 1889. Samuel Hughes, dep't- U. S. marshal.

	2 services at $2.00----	$4 00
18	2 copies of bill at $2.00-	4 00
		$8 00

(Endorsed:) Original. # 206. Circuit court United States, southern division of the eastern district of Tennessee. United States Express Company *vs.* J. W. Allen *et als.* Chancery subpœna. Returnable to rule day in October, A. D. 1889. Henry O. Ewing, deputy clerk. Issued Sept. 6th, A. D. 1889. Henry O. Ewing, dep. clerk.

Plea. Filed Sept. 19th, 1889.

Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee, at Chattanooga.

THOMAS C. PLATT
vs.
J. W. ALLEN *et al.*
} Plea in Abatement of Defendants.

Defendants, J. W. Allen, A. Shelton, and S. D. Cate, in their own proper persons, come and defend the wrong, etc., and say that the court ought not to take cognizance of or sustain the action aforesaid, because they say that by the public laws of the State of Tennessee, by the acts of the Legislature of said State of 1873, chap. 44, page 71, which act *is* carried into Milliken & Vertrees' compilation of the statutes at sections 926 to 935, inclusive (which said act the said defendants refer to, adopt, and make a part of this plea in as
19 full and ample a manner as if herein set out in full), the court cannot maintain or sustain this action, for said act provides that complainant's only remedy is to pay under protest the taxes complained of, and then sue within thirty days thereafter for a recovery of the amount so paid; and no injunction or other restraining order or writ to prevent the collection of said tax will lie; and defendants plead this act in abatement of this suit.

Wherefore they pray judgment if the court will take further cognizance of or sustain the action aforesaid, &c.

J. W. ALLEN,
A. SHELTON, &
S. D. CATE,
By W. G. M. THOMAS.

JOEL B. FORT AND
W. G. M. THOMAS, *Solicitors.*

Southern Division of the Eastern District of Tennessee, *ss:*

J. W. Allen, one of the above-named defendants, for himself and the other defendants named in the foregoing plea, being duly sworn, says that the above plea is true in substance and matter of fact.

J. W. ALLEN.

Sworn to before me this 19th day of September, 1889.

HENRY O. EWING,
Deputy Clerk.

Motion of Defendants. Filed Sept. 19th, 1889.

THOMAS C. PLATT
vs.
J. W. ALLEN *et als.*

In this cause defendants come, for the purpose of this motion only,

and move the court to quash the writ in this case and dismiss the bill and amended bill for the following reasons, to wit:

20 1st. This suit is brought in a district other than that of which defendant Allen is an inhabitant and other than that in which he was found at the time the writ was served on him, contrary to the statute laws of the United States and the rules of practice of this court.

2nd. The complainant seeks to maintain this suit by virtue of a certain alleged statute of the State of New York, and said statute is not averred or set out in the bill, as required by law.

3rd. Under the public laws of the State of Tennessee, Acts of 1873, chap. 44, page 71, of which this court takes judicial notice, complainant's only remedy is to pay under protest the taxes complained of, and then sue within 30 days thereafter to recover the same, and no restraining order or injunction will lie against the collecting officer.

4th. The citizenship of the parties does not affirmatively appear, so as to give this court jurisdiction. The party complaining is shown to be not a corporation but a joint-stock association and partnership organized in the State of New York, and it is not shown that the individual members or partners are citizens of States other than Tennessee.

5th. No irreparable injury or other ground of equitable jurisdiction is shown in the bill. Complainant has full, adequate, and complete remedy at law under the said act of 1873.

For these several reasons defendants move the court to quash the writ and dismiss the suit.

21 *Amended Bill of Complaint. Filed* 1889, *Sept.* 19*th.*

To the judges of the circuit court of the United States for the southern division of the eastern district of Tennessee:

Thomas C. Platt, a citizen of the State of New York and a resident of said State, as president of the United States Express Company and as a member thereof, on behalf of himself and all the other members thereof, who are too numerous to be joined as parties hereto, brings this bill of complaint against James W. Allen, comptroller of the State of Tennessee, a citizen and resident of said State; A. Shelton, and S. D. Cate, citizens of Hamilton county and residents of said State, former being sheriff and the latter deputy sheriff of said county; and thereupon your orator complains and says:

I. The United States Express Company is an incorporated joint-stock association organized in the State of New York, having its principal place of business in the city of New York, and consisting of more than one thousand persons or associates, all of whom have a joint ownership and interest in the cause of action hereinafter set forth.

II. In the year 1880 your orator was duly elected president of the United States Fxpress Company, and from that time to the present he had been and now is such president, and during all that

time he has been and now is a member of the said company. Under and by virtue of the statutes of the State of New York hereinafter referred to the said United States Express Company has the right to sue in the name of its president in respect to all matters relating to the business and affairs of the said company, and is
22 liable to be sued in the name of its president. The statutes of the State of New York relating to suits by and against unincorporated joint-stock associations are contained in article I, title V, chapter XV, of the Code of Civil Procedure, being sections 1919 to 1931 of chapter 178 of the Laws of 1880, which your orator now brings into court and makes a part of this bill of complaint.

III. The said United States Express Company at the several times hereinafter mentioned was and now is engaged in the conduct of an express business of the character and in the manner hereinafter defined.

IV. The express business, as carried on by the United States Express Company and the other express companies of the United States, consists in receiving and forwarding, upon and by means of railroads, steam vessels, and other vehicles of rapid transit, in a safe and careful manner and with the greatest practicable expedition and in the special care and custody of its own employees, and at destination personally delivering, packages of money or currency, gold, silver, bills, deeds, and other valuable papers, jewels, silks, laces, and other articles of great value requiring for their security extraordinary care and precaution, and also parcels of goods, wares, and merchandise requiring great dispatch or careful handling; also fruits, vegetables, meats, and other articles liable to decay; and also in receiving and forwarding for collection bills, notes, drafts, and accounts and receiving and returning payment thereof, and also in receiving and forwarding articles of trade and commerce, with bills and charges of the shippers thereto attached, to be collected of the consignee on delivery of such articles, and by so doing in
23 affording to the public, under a single contract and on assured responsibility, safe, reliable, and speedy transportation from and to all points accessible over and by means of railroads, steamships, and other vehicles, and generally in performing for the public all the offices that by usage are incident to the class of business now well known, recognized, and designated as express forwarders.

In the conduct of said business an express company does not employ railroads, steamboats, or vehicles of its own, except express wagons, but enters into contracts with railroads and other transportation companies, whereby cars or spaces on cars on passenger trains are set apart for the use of the express company and placed in the charge of an employee of the express company who travels on the car, receiving from and distributing to other employees of the express company at the different stations along the route articles entrusted to the express company's care. In the larger cities and towns in which the express company has offices it has express wagons for the collection of articles from its patrons to be forwarded from those places and for the distribution of articles brought there.

It is one of the essential features of the express business that express matter is under the immediate personal care of an employee of the express company during the whole extent of the express company's route, and for the safe and efficient conduct of the business it is important that an express company's routes should not be confined to one railroad or a limited extent of territory, but that it should be able to forward articles between distant points always under the charge of its own employees.

V. The necessity for direct communication with patrons,
24 for constant personal supervision, and for operation over great distances renders it impossible for the business to be carried on by railroad companies through their own instrumentalities, and requires the employment of companies specially organized and equipped for the purpose; and your orator is informed and believes that the express business is almost exclusively carried on by such companies, which, by means of contracts with connecting lines of railroad, are enabled to forward packages between distant points in different States; and your orator is informed and believes that each of the principal express companies operates over lines extending through many States, over many thousand miles of railroad connecting the principal commercial centres of the United States with each other and with all the points along the different routes.

VI. Your orator further shows that the express business as above defined was first organized about the year 1839, and has since increased to such an extent that it extends all over the United States and into Canada and Mexico. Facilities for communication by express have become a public necessity, on which are founded long-settled habits of business, and their existence has largely aided in the commercial growth and prosperity of the country; and your orator is informed and believes that there is no railroad in the United States which is not equipped with express facilities. The necessity for such facilities is not confined to cities and towns of great commercial importance, but nearly all places along the routes of railroads require that facilities for such communication should exist not only with large places but also with each other.

VII. Involving as said business does the use of the pas-
25 senger trains and the stations and terminal facilities of the railroad company, and to a certain extent its agents, it has become recognized both by the railroad and express companies as essential to the efficient conduct of the business that all business done over a given route should be conducted by one express company, and a contract between a railroad and an express company usually provides that the express company operating over the railroad company's line shall conduct the whole express business on said route and shall provide all the facilities required by the public along the route. These facts render it necessary for an express company operating over a line of railroad to establish offices at nearly all places along the route and afford to the public at all those places facilities for express communication with each other and with all parts of the United States.

VIII. Your orator further shows that the United States Express Company has been engaged in conducting an express business in the manner above described since its organization, in 1854, and the lines of the railroad companies with which it has contracts of the character above set forth extend through nearly all of the States east of the Mississippi and Missouri rivers, and some States west thereof, and aggregate in length nearly 25,000 miles, and the express company has offices established at all important points along these routes and at nearly all the smaller ones, and is conducting an express business between all points where it has its offices.

Since September 1st, 1887, the United States Express Company has carried on its business from Cincinnati, in the State of
26 Ohio, to New Orleans, in the State of Louisiana, over what is known as the Queen and Crescent route, which is composed of the Alabama Great Southern railroad, the Cincinnati, New Orleans and Texas Pacific railroad, the New Orleans and Northeastern railroad, the Alabama and Vicksburg railway, and the Vicksburg, Shreveport and Pacific railroad, and under one contract for the necessary express facilities, signed by each of the railroad companies owning these roads respectively, thus giving the express company one single route for its business, extending through the States of Ohio, Kentucky, Tennessee, Georgia, Alabama, Mississippi, and Louisiana, and this route or line from Cincinnati to New Orleans has no reference whatever to the boundaries of the respective States through which it extends, but is a single through line for the purpose of an interstate business, of which the receipt and delivery of packages wholly within any particular State is a mere incident of comparatively small pecuniary importance to the company, as hereinafter stated.

Said contract provides for the conduct of all the express business along said route by said express company to the exclusion of all other companies; and your orator is advised that said contract contemplates the establishment of offices at all points and carrying on an express business at and forwarding articles between all points along said route by the express company. Your orator further shows that said contract does not expire until December, 1891.

The said United States Express Company has established and now has offices all along said route, and has expended large
27 sums of money in their equipment. Its largest office in Tennessee is at Chattanooga, and it also has about twenty-five other offices in said State along said route, and since September 1, 1887, it has been constantly engaged in forwarding articles between those offices, as well as between those and other offices in different parts of the United States. Your orator further shows that said express company does not carry on business over any line of railroad lying wholly within the State of Tennessee.

IX. Your orator further shows that by an act of the Legislature of the State of Tennessee approved March 25th, 1887, being chapter II of the Acts of 1887, it was provided that the occupation and business of an express company should be deemed a privilege, and not pursued or done without a license, and that by another act of the

Legislature of said State, approved March 29th, 1887, being chapter I of the Acts of 1887, it was provided that the following taxes should be paid by express companies as a tax on said privilege: "In lieu of all other taxes except ad valorem tax. If the lines are less than one hundred miles long, per annum, $1,000. If the lines are over one hundred miles long, per annum, $3,000."

By said act it is further provided that any and all parties, firms, or corporations exercising said privilege shall pay said tax for the exercise thereof, and it is thereby declared to be a misdemeanor to exercise the same without payment of said tax, and is made punishable by fine and imprisonment.

The privilege *on* license tax exacted by the said statute is the price demanded and exacted by the State of Tennessee of the United States Express Company and all other express companies for
28 the privilege of maintaining in that State the offices, plant, and employees convenient and necessary for the transaction of a general interstate express business, and is a tax levied by that State upon the occupation of carrying on an interstate express business as the same is hereinbefore defined, and is therefore a tax upon interstate commerce itself, not being restricted or having any relation to express business carried on wholly within the State, nor to the proceeds of such business, nor to any kind of property situate within the State.

X. Your orator further shows that by an act passed April 5th, 1889, being chapter 130 of the acts of 1889, it is provided that express companies shall pay a tax on their privilege of doing express business as follows:

"(In lieu of all other taxes except ad valorem tax.) If the lines are less than one hundred miles long, for one or more packages taken up at one point in this State and transported to another point in this State, per annum, $1,000.00. If the lines are more than one hundred miles long, for one or more packages taken up at one point in this State and transported to another point in this State, per annum, $3,000. The above tax only applies to express companies running or doing business on cars or boats, &c."

It is also by last-mentioned act made a misdemeanor punishable by fine or imprisonment to conduct the express business without first paying said tax.

The above-mentioned act of 1889 also imposes the tax therein mentioned as a license or privilege tax for carrying on the business of interstate commerce and for pursuing that occupation within the State of Tennessee for the same reasons as above stated in respect to
29 the act of 1887. The tax is not imposed upon the packages received and delivered within the State nor upon the earnings of express companies from business carried on wholly within the State, but the act imposes a license fee for carrying on interstate commerce proportioned in amount to the distance which express matter is carried within or without the State.

It is further provided by the laws of Tennessee that the aforesaid taxes shall be payable to the comptroller of the State, who is empowered by said laws, as your orator is advised, to issue his warrant

for the collection thereof and levy upon the property of any express company not paying the tax.

XI. Your orator further shows that said express company has been and is, as above set forth, engaged in commerce among the several States, and your orator alleges that all its agents in Tennessee and all its property in said State are employed in such commerce. Your orator further shows that the same property and agents are also at the same time employed in taking up packages at one point in Tennessee to be transported to other points in Tennessee, but not as a separate or distinct part of the company's whole business; that from the nature of the express business as carried on both by the said express company and by all other express companies taking up packages at one point in a State to be transported to another point in the same State cannot be carried on as a separate or distinct branch of the whole business, either as to the instrumentalities employed or the expenses incident thereto; but the whole business is conducted as a unit, the same agents at one and the same time collecting, forwarding, and distributin gall arti-
30 cles entrusted to the company's care in one mass, in the same wagons and cars without regard to whether their origin and destination are the same or different States; nor could such a separation be made without employing a distinct set of wagons and horses and a separate set of agents in each State and on each route to handle exclusively those packages forwarded between the points in the same State, at an expense which would exceed the receipts from that branch of the business; nor could it be done without causing the same confusion and loss which would result from the operation of two separate express companies over the same line of railroad.

XII. Your orator further shows that the total amount of moneys received by the United States Express Company for articles taken up at one point in the State of Tennessee to be transported to other points in the same State, between the 1st of September, 1887, and the 1st of September, 1889, amounts to $11,275.55, an average of $5,637.77 per annum; that by the terms of the aforesaid contract with the railroads forming the Queen and Crescent route the said express company is obliged to pay to said railroads an amount equal to forty-five per cent. thereof, and that after payment thereof and of the expenses incident to the business the balance of said receipts is not sufficient to pay the license fee imposed by the aforesaid acts of Tennessee; that after payment of the expenses less than $500 per annum is left to pay said license fees, and if forced to pay said license fees the said United States Express Company will be obliged to pay them from moneys received from packages forwarded between
31 points in said State and points in other States.

XIII. Your orator further shows that the United States Express Company, being advised that the laws imposing said taxes are in violation of the Constitution of the United States, has never paid either of said taxes, and that on or about the 5th day of August, 1889, the above-named James W. Allen, as comptroller of the State of Tennessee, and claiming to act under and by virtue of the au-

thority conferred upon him by the laws of said State, issued his warrant to the sheriff of Hamilton county, who placed the same in the hand of his said deputy, S. D. Cate, commanding him to seize sufficient goods and chattels of the United States Express Company to make by the sale thereof the sum of six thousand dollars, with interest on three thousand dollars from Sept. 1st, 1887, and interest on the other three thousand dollars thereof from September 1st, 1888, together with costs and charges, and to sell the same for the said taxes.

The said sheriff has levied on or is about to levy on the property of the United States Express Company under said warrant for the collection of said tax.

Your orator further says that the defendant, the said comptroller, also claims that a further license or privilege fee for carrying on its express business has become due and payable by the said United States Express Company under the provisions and requirements of the aforesaid act of 1889, and that the said comptroller threatens to issue and is about to issue and cause to be levied his warrant for the collection thereof in pursuance of the provisions of the said act of 1889.

XIV. Your orator is advised and alleges that the said
32 acts of the State of Tennessee are and each of them is in violation of article I, section VIII, subdivision 3, of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several States, and that they are and each of them is also in violation of section 1 of article XIV of the amendments of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

XV. Your orator further shows that the property of the said United States Express Company in Tennessee is employed in interstate commerce in the said express business and necessary to the conduct of it; that if seized by the said sheriff it will greatly embarrass the company in the conduct of such business and subject it to heavy loss and damage, and the public served by it to great loss and inconvenience.

Your orator further says that your orator and the United States Express Company are without adequate remedy at law in the premises.

Your orator therefore prays—

That the defendants may be enjoined and restrained from levying or endeavoring to levy on the property of said United States Express Company under the aforesaid warrant or any warrant or warrants issued or to be issued under the several acts of the Legislature of the State of Tennessee herein set forth, and from collecting or endeavoring to collect the taxes imposed by the aforesaid acts of the State of Tennessee or either of them, and from inter-
33 fering or attempting to interfere with the said express com-

pany in the operation of its business or any part thereof by reason of the non-payment of said taxes or either of them.

That a temporary and provisional injunction, to the same effect as that prayed for in the last preceding paragraph, may be issued during the pendency of this action; for such other and further relief as may be just and equitable.

And may it please your honors to grant unto your orator a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, to said defendant, James W. Allen, commanding him on a day certain therein to be named, under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to, perform, and abide such further order, direction, and decree as may be made in the premises against him.

And your orator will ever pray, &c.

T. C. PLATT,
As President of the United States Express Co.

N. N. MACFARLAND,
Of Counsel.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Thomas C. Platt, being duly sworn, says that he has read the foregoing bill of complaint, and that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

T. C. PLATT.

Sworn to before me this 16th day of September, 1889.

34 WILLIAM PARKIN,
[SEAL.] *Notary Public, N. Y. Co.*

Circuit Court of the United States, Southern Division of the Eastern District of Tennessee.

THOMAS C. PLATT, as President of the United States Express Company,
vs.
JAMES W. ALLEN, Comptroller, *et al.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Thomas C. Platt, being duly sworn, says:

I am president of the United States Express Company and the complainant in this suit on behalf of that company. I am thoroughly acquainted with all the business and affairs of that company, and, having carefully perused the bill of complaint, I say of my own knowledge that all of the allegations therein contained in relation to the said company and its business are in every respect true, and I herein and hereby reaffirm the same as fully and particularly as if the several allegations of the bill were herein set out and repeated at length. I annex hereto a statement, marked "Exhibit A," show-

ing the total receipts of the United States Express Company for packages taken up at one point in the State of Tennessee to be transported to another point in the State for each month from September 1st, 1887, to September 1st, 1889.

T. C. PLATT.

Sworn to before me this 16th day of September, 1889.

[SEAL.] WM. PARKIN,
Notary Public, N. Y. Co.

35 EXHIBIT A.

Receipts. 1887–'8.		*Receipts.* 1888–'9.	
September	$374 60	September	$410 02
October	419 03	October	454 09
November	458 30	November	437 99
December	586 73	December	643 75
January	412 04	January	462 46
February	418 11	February	336 82
March	426 69	March	424 51
April	441 06	April	447 83
May	491 79	May	549 25
June	478 78	June	501 93
July	535 07	July	637 83
August	468 12	August	458 75
Total	$5,510 32	Total	$5,765 23
			5,510 32
		Grand total	$11,275 55

36 *Opinion of the Court. Filed Sep.* 21, 1889.

UNITED STATES EXPRESS CO. }
vs.
J. W. ALLEN and Others. }

The bill is filed in this case to enjoin the collection of a tax imposed upon complainant by the State, by the acts of 1887 and 1889, upon the ground that the tax is in violation of the Constitution of the United States. At the threshold we are met with a motion by defendants to dismiss the suit for various reasons. It is insisted that there is not such diverse citizenship as to give this court jurisdiction. Diverse citizenship is one ground of jurisdiction in a Federal court, but not the sole ground by any means. Controversies as to the Constitution and laws of the United States are of Federal judicial cognizance as well, and the question in this case arises out of this branch of the court's jurisdiction, to which defendants' motion does not apply. Another reason for the motion to dismiss is because the State of Tennessee has by law provided that the remedy in such

cases as the one under consideration is to pay the taxes assessed under protest, and then bring suit to recover the same. This act of the Legislature is constitutional unquestionably, but the case of Poindexter *vs.* Greenhow, 114 U. S., 270, is decisive of the point made. Virginia had a law of like provisions with the Tennessee law, and objection was made that the money had not been paid and suit brought therefor; but the court held substantially that as Virginia had enacted a law making certain coupons receivable for taxes and as the coupons had been tendered and refused, the provision of the Federal Constitution against legislation impairing the
37 obligations of contracts had been violated and no payment of the tax could be required as a condition of bringing suit. An unconstitutional tax is a void tax, and no right or duty can inhere in or depend upon it. There was no prepayment of the tax and suit thereafter in the Virginia case. It is true coupons had been tendered, but this was done not as compliance with the Virginia statute or under its provisions; but it was done so that the tax-payer might comply with the terms of his contract with the State, and, if the State refused to stand by its bargain, that he might find protection under the Federal Constitution. If in the case in hand the tax is unconstitutional it is void. It confers no right, imposes no duty, supports no obligation; nothing can be predicated upon it.

The only other branch of defendants' motion that is necessary to consider is that suit should be dismissed as to defendant Allen because the face of the bill shows that he is not a resident of this district. As to this, the motion must be sustained. The act of Congress approved August 13, 1888, correcting the enrollment of the act of March 3, 1887, provides in section 1: "No civil suit shall be brought before either of said courts" (the district or circuit) "against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or defendant" (25 Statutes, 434). This suit is not founded on diverse citizenship and does not fall
38 under the last category of the clause quoted; but it does fall under the first, and the language is positive and peremptory. This leaves the case here as to the sheriff and his deputy, to whom the process for the collection of the tax came and by whom it was levied and whom it is sought to enjoin.

The bill seeks to enjoin the collection of two taxes, or a tax imposed in two years, each for $3,000. The Legislature of Tennessee, by an act approved March 29th, 1887, provided that the following taxes should be paid by express companies: "In lieu of all other taxes except ad valorem tax. If the lines are less than 100 miles long, per annum, $1,000. If the lines are over 100 miles long, per annum, $3,000." The same authority, by an act approved April 5, 1889, provided that express companies should pay a tax "(in lieu of all other taxes except ad valorem tax). If the lines are less than 100 miles long, for one or more packages taken up at one point in this State and transported to another point in this State, per annum,

$1,000.00. If the lines are more than 100 miles long, for one or more packages taken up at one point in the State and transported to another point in this State, per annum, $3,000.00." By these acts it is made a misdemeanor punishable — fine and imprisonment to conduct the express business without prepayment of the tax. In a case entitled "Commonwealth of Kentucky *vs.* U. S. Express Company," an act of Kentucky similar in its provisions to the Tennessee law of 1887, the Louisville law and equity court, in an able written opinion, held the Kentucky act void because the tax was an infraction of the provisions of the Federal Constitution in regard to interstate commerce. And the circuit court of the United States for the southern district of Mississippi, in The U. S. Express Com-
39 pany *vs.* Henningway, 39 Fed. Rep., 60, takes a similar view in regard to a Mississippi statute of like import. The cases decided by the Supreme Court of the United States which favor or support a different view of this tax are Osborne *vs.* Mobile, 16 Wallace, 479, and Wiggins Ferry Co. *vs.* E. St. Louis, 107 U. S., 365; but in Le Loup *vs.* Mobile, 127 U. S., 640, the Supreme Court overrules, substantially at least, these decisions. It says: "In view of the course of decisions which have been made since that time (1872), it is very certain that such ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several States." Le Loup *vs.* Mobile, *supra*, 647. This, though said of the Osborne case, must in principle apply with equal force to the Wiggins Ferry case.

It seems to me that under the line of decisions of our Supreme Court the tax imposed upon the complainant by or under the act of 1887 was void as repugnant to the constitutional authority given Congress to regulate commerce between the States. It is in no sense a property or ad valorem tax. It is essentially a license or privilege tax. There is no description of or limitation of the business. It makes no difference whether it be interstate or intrastate. If it be an express company it is taxed. If it be 100 miles long it must pay $1,000. If more, it must pay $3,000. Complainant is an instrumentality of interstate transportation. It does business through and between States as well as within them, and cannot be so taxed.

The act of 1889, however, attempts to avoid the difficulty in which the act of 1887 is involved. It provides that the company must be taxed when it carries one or more packages from one point in the State to another point in the State.
40 This is meant to be considered a tax for the privilege of doing business within the State and to escape being regarded as a tax on business between States. The tax may be avoided should no packages be borne from one point to another in the State. This tax carried to its logical results bears as hardly on the company as the other. If it confine its operations to an interstate business it must still have its agents and officers at the various stations on the lines to receive and deliver its packages, so that the interstate business would be burdened with charges which otherwise would be divided between the two classes of business. The fact that the interstate business may be thus burdened does not necessarily invali-

date the tax, perhaps. But is not this provision of the statute a mere device to fasten the tax upon the company? It is no exercise of the police power of the State. If the tax be paid, it makes not the slightest difference whether the packages taken up and delivered and carried between and at points in the State be one or a million. It is not a tax regulated by the amount of business. It is as much if one package be carried as if ten million go. A package of a dime in value carried five miles may involve a license fee of $1,000 or $3,000, depending altogether on the length of the line of transportation used by the company. The length of the line used is the measure of the tax. This cannot be the standard. (Penn. Steamship Co. *vs.* Pennsylvania, 122 U. S., 326.)

The Supreme Court says in Le Loup *vs.* Mobile, U.S., 645: "Ordinary occupations are taxed in various ways, and in most cases legitimately taxed, but we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exac-
41 tion of a license tax as a condition of doing any particular business is a tax on the occupation of doing a business—is surely a tax on the business." And again, at 648, in the same case, the court says: "In our opinion, such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such a taxation is a burden on that commerce and amounts to a regulation of it, which belongs to Congress." So under the tax law of the State of 1889, although the tax purports on its — to be for carrying on the express business within the State, yet, as already shown, the burden of the tax falls upon the interstate business and amounts to a collection of the tax from that source, to a great extent at least.

It follows from the views announced that an injunction may issue as prayed for, on complainant executing bond, with sufficient surety, in the penalty of ten thousand dollars, to pay and satisfy such decree as may be finally rendered against it in the cause.

D. M. KEY, *Judge.*

42 *Bond in Chancery (Injunction). Filed 25 Day of Sept.,* 1889.

Know all men by these presents that we, the United States Express Company, principal and Charles A. Lyerly, are held and firmly bound unto A. Shelton, sheriff, and S. D. Cate, deputy sheriff, in the penal sum of ten thousand dollars; for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, or administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of ——, in the year of our Lord one thousand eight hundred and —.

The condition of this obligation is such that whereas said principal obligor hath prayed for and obtained from the — court of the United States, holden at Chattanooga, in the State of Tennessee, a

writ of injunction, returnable to the said court, holden at Chattanooga on the first Monday in October next:

Now, if the said principal obligor shall prosecute the said injunction with effect or, in case he fails therein, shall well and truly pay and satisfy the said obligees or either of them all such costs and damages as shall be awarded and recovered against the said obligors in any suit or suits which may be hereafter brought for wrongfully — out of said injunction, and shall, moreover, abide by and perform such orders and decrees as the court may make in this cause, and pay such costs and damages as the court may order, then the above obligation to be void; otherwise to remain in full force and effect.

THE UNITED STATES EXPRESS COMPANY, [SEAL.]
By T. H. WALKER, *Sup't.*
CHARLES A. LYERLY, *Surety.* [SEAL.]
S. W. DIVINE, *Surety.* [SEAL.]

43 We acknowledge and bind ourselves for the prosecution of the above suit and payment of all such costs as may be awarded on the final hearing thereof.

—— ——. [SEAL.]

Injunction. Issued 1889, *Sept.* 25*th. Filed Oct.* 2, 1889.

UNITED STATES OF AMERICA,
Southern Division of the Eastern District of Tennessee, } *ss:*

The President of the United States of America to A. Shelton, sheriff of Hamilton county, Tennessee, and his deputy, S. D. Cate, and to their counsellors, attorneys, solicitors, and agents and each and every of them, Greeting:

Whereas it has been represented to us in our circuit court, in equity, for the southern division of the eastern district of Tennessee, on the part of the United States Express Company, complainant, that it has lately exhibited its bill and amended bill of complaint in our said circuit court against you, the said A. Shelton and S. D. Cate, to be relieved touching the matters therein complained of, in which bill and amended bill it is stated, amongst other things, that you are combining and confederating with others to injure the said complainant touching the matters set forth in said bill and amended bill, and that your actings and doings in the premises are contrary to equity and good conscience:

We therefore, in consideration thereof and of the particular matters in said bill and amended bill set forth, do strictly com-
44 mand you, the said A. Shelton and S. D. Cate, and the persons before mentioned and each and every of you, under the penalty of the law, that you do absolutely desist and refrain from levying or endeavoring to levy on the property of said United States Express Company under the warrant mentioned in the bill and amended bill or any warrant or warrants issued or to be issued under the several acts of the Legislature of Tennessee set forth in

the bill and amended bill, and from collecting or endeavoring to collect the taxes imposed by the aforesaid acts of the State of Tennessee or either of them, and from interfering or attempting to interfere with the said express company in the operation of its business or any part thereof by reason of the non-payment of said taxes or either of them until the further order of our said circuit court.

To the marshal of the eastern district of Tennessee to execute.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of Chattanooga, the 25th day of September, one thousand eight hundred eighty-nine.

HENRY O. EWING,
[SEAL.] *Deputy Clerk.*

(Endorsed:) Came to hand day issued and executed by serving same on A. Shelton, sheriff, and Sam. D. Cate, deputy sheriff, this Oct. 1st, 1889. Sam. Hughes, dep. U. S. marshal. Bill of cost: 2 summons, $4.00.

45 *Answer of Shelton and Cate. Filed* 1889, *Dec. 27th.*

The United States Circuit Court, Southern Division of the Eastern District of Tennessee, at Chattanooga.

UNITED STATES EXPRESS COMPANY
vs.
J. W. ALLEN *et al.*

Answer of def'ts Shelton & Cate.

For answer these defendants say that by leave of the court, heretofore obtained, they rely upon the following grounds, set out in their motion filed in this cause Sept. 19th, 1889:

1st. Compl't seeks to maintain this suit by virtue of a certain alleged statute of the State of New York, and said statute is not averred or set out in the bill, as required by law.

2nd. Under the public laws of the State of Tennessee, Acts 1873, chap. 44, page 71, of which this court takes judicial notice, compl't's only remedy is to pay under protest the taxes complained of, and then sue within 30 days thereafter to recover the same, and no restraining order or injunction will lie against the collecting officer.

3rd. The citizenship of the parties does not affirmatively appear, so as to give this court jurisdiction. The company complaining is shown to be not a corporation, but a joint-stock association and partnership organized in the State of New York, and it is not shown that the individual members or partners are citizens of States other than Tennessee.

4th. No irreparable injury or other ground of equitable jurisdiction is shown in the bill; compl't has full, adequate, and complete remedy at law under the said act of 1873.

46 And for further answer they say that, by leave of the court first obtained, they rely upon the ground and matters of their plea filed in this cause on the 19th day of Sept., 1889, because they say that by the public laws of Tennessee, as hereinbefore set out, complainant cannot maintain this suit, and they refer to, adopt said plea, and make it a part of this answer as fully as if herein set out in full.

And by further leave of the court they refer to, adopt, and make a part of this answer their motion, heretofore entered in this cause, that this suit having been dismissed as to J. W. Allen, comptroller, etc., the bill and amended bill show that they are merely the sheriff and deputy sheriff to whom came distress warrant issued for the tax complained of, and are not such parties to this cause as will authorize any decree against them, or any such decree as is sought by the bills in this case.

And they rely upon the said ground of motion in defense of this suit.

And now, without waiving any of said causes or grounds of defense and for further answer, they say they have no interest whatever in this suit, except that they happened to be officials of Hamilton county, Tennessee—one the sheriff of said county and the other a deputy sheriff—and the chief office of the compl't in Tennessee was in said county, and the distress warrant from the State of Tennessee issued to collect the taxes complained of was received by these defendants by virtue alone of their official positions, and they, as it was their duty to do under the law and as they were bound and required to do under the law, proceeded to obey the mandate of said warrant.

They submit that they are not necessary parties to this
47. suit, nor even proper parties.

They submit further that the leading defendant, J. W. Allen, comptroller of said State, not now being a party to this suit, the suit having been dismissed as to him, that the complainant cannot now maintain this suit against these defendants, and that the same ought to be dismissed.

They admit that the acts of 1887 and 1889, referred to in the bill, apply to complainant express company, and that said company has not paid taxes for 1887, 1888, or 1889, and refuses to do so; but they deny that said acts are unconstitutional and in violation of the Constitution of the United States. Particularly is — true of the act of 1889, for it in no way affects or assumes to affect interstate commerce, but has reference alone to business done within the State of Tennessee. They submit that Tennessee has the right to tax its own internal business, and that for business done wholly within its borders the question of interstate commerce cannot and does not arise.

They deny complainant's right to exemptions from this tax and submit that the injunction should be disallowed, particularly as to the tax of 1889, under the said act of 1889; and this, together with the various other questions made by these defendants, they submit

ought to dismiss this suit; and, having fully answered, they pray to be hence dismissed with their costs, etc.

A. SHELTON,
S. D. CATE,
By Counsel.

JOEL B. FORT,
W. G. M. THOMAS,
Solicitors for Defendants.

48 United States of America, Southern Division of the Eastern District of Tennessee.

A. Shelton and S. D. Cate, being duly sworn, do depose and say that they are the defendants named in the foregoing answer; that they have read the same and know the contents thereof, and that the same is true of their own knowledge, except as to the matters therein stated on information and belief, and as to those matters they verily believe it to be true.

A. SHELTON.
S. D. CATE.

Subscribed and sworn to before me this the 27th day of December, 1889.

HENRY O. EWING,
Deputy Clerk.

Replication. Filed 1889, *Dec.* 27*th.*

In the United States Circuit Court for the Southern Division of the Eastern District of Tennessee.

UNITED STATES EXPRESS COMPANY
vs.
J. W. ALLEN *et al.*

The replication of Thomas C. Platt, president of the United States Express Company, to the answer of defendants, A. Shelton and S. D. Cate.

This replicant, saving and reserving unto himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had and taken to the manifold insuf-
49 ficiencies of the said answer, for replication thereto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by replicant without this; that any other matter or thing whatsoever in the said answer contained material or effective in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed, or denied, is true; all of which matters and things the replicant is and will be ready to aver, maintain, and prove as this honorable

court shall direct, and humbly prays as in and by his said bill he hath already prayed.

JOHN M. BRIGHT,
R. L. BRIGHT,
RUSSELL & DANIELS,
Solicitors for Complainant.

50 *Appeal Bond. Filed January —, 1890.*

Know all men by these presents that we, A. Shelton and S. D. Cate, as principals, and W. G. M. Thomas and W. G. McAdoo, Jr., as sureties, are held and firmly bound unto Thomas C. Platt, as president of the United States Express Company, in the full and just sum of — dollars, to be paid to the said Platt, as president, etc., — certain attorneys, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of December, in the year eighteen hundred and eighty-nine.

Whereas lately, at a circuit court of the United States for the southern division of the eastern district of Tennessee, in a suit depending in said court between Thomas C. Platt, as president of the U. S. Ex. Co., against J. W. Allen, comptroller, *et al.*, a decree was rendered against the said A. Shelton and S. D. Cate; and the said Shelton and Cate having obtained an appeal and filed a copy thereof in the clerk's office of said court to reverse the decree in the aforesaid suit, and a citation directed to the said Platt, as president, &c., citing and admonishing him to be and appear at the Supreme Court of the United States, now sitting in Washington, or that to be holden there the second Monday of October next:

'Now, the condition of the above obligation is such that if said Shelton and Cate shall prosecute their appeal to effect and
51 answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

A. SHELTON,
S. D. CATE,
By W. G. M. THOMAS, *Sol'r.*
W. G. M. THOMAS, *Surety.*
W. G. McADOO, Jr., *Surety.*

Sealed and delivered in the presence of—
—— ——.

Approved by—
—— ——.

52 Be it remembered that at a circuit court of the United States began and held for the southern division of the eastern district of Tennessee, at the court-house, in the city of Chattanooga, within said district and the sixth circuit, on the first Monday, it

being the first day, of April, A. D. 1889, the following proceedings were had, to wit:

Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern district of Tennessee.

THURSDAY MORNING, *Sept. 19th*, 1889.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

THE UNITED STATES EXPRESS CO.
vs.
J. W. ALLEN, Comp., *et als.* } In Equity. #206.

Upon motion of complainant in this cause, leave is given it to file its amended bill, which is accordingly done.

SATURDAY MORNING, *Sept. 21st*, 1889.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern district of Tennessee.

UNITED STATES EXPRESS COMPANY
vs.
J. W. ALLEN, Comp., *et als.* } In Equity. #206.

This cause having heretofore been heard upon the motion of complainant for an injunction, and the same having been considered by the court, it is ordered that upon complainant executing bond, with good security, in the sum of ten thousand dollars, injunction
53 as prayed for in the original bill and amended bill may issue against defendants, A. Shelton and S. D. Cate.

Be it remembered that at a circuit court of the United States began and held for the southern division of the eastern district of Tennessee, at the court-house, in the city of Chattanooga, within said district and the sixth circuit, on the first Monday, it being the seventh day, of October, A. D. 1889, the following proceedings were had, to wit:

Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

FRIDAY MORNING, *October 11th*, 1889.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

THE UNITED STATES EXPRESS CO.
vs.
J. W. ALLEN, Comp., *et als.* } #206. Equity.

This cause was heard on defendants' motion to dismiss the bill,

which, being argued, the court sustains in so far as J. W. Allen is concerned. It is therefore decreed that this suit be, and it is hereby, dismissed as to said def't Allen, and all the costs of making him a party thereto are adjudged against compl't and his surety on cost bond, for which execution may issue.

FRIDAY MORNING, *December 27th*, 1889.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

54 UNITED STATES EXPRESS COMPANY *vs.* J. W. ALLEN, Comp., *et als.* } # 206.

This cause was heard upon the motion of defendants, heretofore entered, which being argued, the court overruled all of the same except the first, which is sustained. It is therefore decreed that this suit, as to defendant J. W. Allen, be, and the same is hereby, dismissed, and all the costs incident to making said Allen party defendant hereto are adjudged against the plaintiff and security, for which a judgment is rendered, and an execution may issue against plaintiff and his sureties, R. L. Bright and T. H. Walker; to which action of the court in overruling the 2d, 3d, 4th, and 5th grounds of the said motion the defendants except.

UNITED STATES EXPRESS COMPANY *vs.* J. W. ALLEN *et als.* } # 206.

This cause was again heard upon the plea of defendants setting up and relying upon the act of the Legislature of the State of Tennessee of 1873, chapter 44, page 71, which the court strikes out as insufficient in law, and it is decreed that said plea be, and the same is hereby, stricken from the file; to which action of the court in striking out said plea the def'ts except, and upon application of defendants they are granted leave to rely upon the matter of said plea and several grounds of motion in their answer.

UNITED STATES EXPRESS CO. *vs.* J. W. ALLEN, Comp., *et als.* } # 206.

55 Defendants Shelton and Cate come and move the court to dismiss this suit because, said suit having been dismissed as to J. W. Allen, the bill and amended bill will show that they are merely the sheriff and deputy sheriff to whom came the distress warrant issued for the tax complained of, and are not such parties to this cause as will authorize any decree against them or any such decree as is sought by the bills in this cause.

UNITED STATES EXPRESS CO.
vs.
J. W. ALLEN, Comp., *et als.* } # 206.

This cause was again heard on defendants Shelton and Cate's motion to dismiss this suit; which motion the court overrules and disallows; to which action of the court the said defendants except. But said defendants are allowed to rely upon in their answer the grounds of said motion.

UNITED STATES EXPRESS COMPANY
vs.
J. W. ALLEN, Comp., *et als.* } # 206.

This cause came on to be further heard at this term, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the preliminary injunction heretofore ordered against defendants Shelton, sheriff, and S. D. Cate, deputy sheriff, of Hamilton county, Tennessee, be made perpetual, and that they are perpetually enjoined from further proceeding to execute the distringas placed in their hands; and it is further ordered, adjudged, and decreed that they pay the costs of the cause, for which let execution issue.

To which decree said defendants Shelton and Cate except
56 and from which they pray an appeal to the Supreme Court of the United States, which appeal is granted upon their giving bond and security for the costs of the appeal, which has been done.

UNITED STATES OF AMERICA,
Southern Division of the Eastern District of Tennessee, } *ss:*

I, Henry O. Ewing, deputy clerk of the United States circuit court for the district and division aforesaid, do hereby certify that the foregoing 56 pages constitute a full, true, and perfect transcript of the pleadings, record, and proceedings in the case of The United States Express Company *vs.* J. W. Allen, comptroller, *et als.*, as the same appears of record and on file in my office.

Witness my hand and seal of the said court this 10th day of February, A. D. 1890.

{ The Seal of the United States Circuit Court, District of East Tenn., Southern Div'n. }

HENRY O. EWING,
Deputy Clerk.

Endorsed on cover: E. Tennessee C. C. U. S. No. 1609. A. Shelton, sheriff, and S. D. Cate, deputy sheriff, of Hamilton county, Tennessee, appellants, *vs.* The United States Express Company. Filed April 14, 1890.

OF THE SUPREME COURT
OF THE U.S.
JAN 24 1891
JAMES H. MCKENNEY
CLERK

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1890.

W. CARLTON SHELBY AND E. D. TATE, DEPUTY SHERIFFS OF HAMILTON COUNTY, TENNESSEE, APPELLANTS,

vs.

THOMAS C. MAXEY, AS PRESIDENT OF THE UNITED STATES EXPRESS COMPANY.

No. 1185.

BRIEF AND ARGUMENT BY

G. W. PICKLE,

Attorney General for the State of Tennessee.

Printed by Marshall & Bruce, Nashville.

UNITED STATES EXPRESS CO. } = 206.
vs.
J. W. ALLEN, Comp., *et als.* }

This cause was again heard on defendants Shelton and Cate's motion to dismiss this suit; which motion the court overrules and disallows; to which action of the court the said defendants except. But said defendants are allowed to rely upon in their answer the grounds of said motion.

UNITED STATES EXPRESS COMPANY } = 206.
vs.
J. W. ALLEN, Comp., *et als.* }

This cause came on to be further heard at this term, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the preliminary injunction heretofore ordered against defendants Shelton, sheriff, and S. D. Cate, deputy sheriff, of Hamilton county, Tennessee, be made perpetual, and that they are perpetually enjoined from further proceeding to execute the distringas placed in their hands; and it is further ordered, adjudged, and decreed that they pay the costs of the cause, for which let execution issue.

To which decree said defendants Shelton and Cate except
56 and from which they pray an appeal to the Supreme Court of the United States, which appeal is granted upon their giving bond and security for the costs of the appeal, which has been done.

UNITED STATES OF AMERICA, } *ss:*
Southern Division of the Eastern District of Tennessee, }

I, Henry O. Ewing, deputy clerk of the United States circuit court for the district and division aforesaid, do hereby certify that the foregoing 56 pages constitute a full, true, and perfect transcript of the pleadings, record, and proceedings in the case of The United States Express Company *vs.* J. W. Allen, comptroller, *et als.*, as the same appears of record and on file in my office.

Witness my hand and seal of the said court this 10th day of February, A. D. 1890.

{ The Seal of the United States Circuit Court, }
{ District of East Tenn., Southern Div'n. }

HENRY O. EWING,
Deputy Clerk.

Endorsed on cover: E. Tennessee C. C. U. S. No. 1609. A. Shelton, sheriff, and S. D. Cate, deputy sheriff, of Hamilton county, Tennessee, appellants, *vs.* The United States Express Company. Filed April 14, 1890.

Office Supreme Court U. S.
FILED,
JAN 24 1891
JAMES H. McKENNEY
CLERK

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1890.

A. SHELTON, SHERIFF, AND S. D. CATE, DEPUTY SHERIFF, OF HAMILTON COUNTY, TENNESSEE, APPELLANTS,

vs.

THOMAS C. PLATT, AS PRESIDENT OF THE UNITED STATES EXPRESS COMPANY.

No. 1155.

BRIEF AND ARGUMENT BY

G. W. PICKLE,

Attorney General for the State of Tennessee.

Marshall & Bruce, Stationers, Nashville.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1890.

A. SHELTON, SHERIFF, AND S. D. CATE, DEPUTY SHERIFF, OF HAMILTON COUNTY, TENNESSEE, APPELLANTS,

vs.

THOMAS C. PLATT, AS PRESIDENT OF THE UNITED STATES EXPRESS COMPANY.

No. 1155.

This suit in equity was brought by the United States Express Company, in the Circuit Court of the United States for the Eastern District of Tennessee, against J. W. Allen, Comptroller (and a collector of taxes) of the State of Tennessee, and A. Shelton, Sheriff, and S. D. Cate, Deputy Sheriff, of Hamilton County, Tennessee, to enjoin certain proceedings, already instituted, for the collection of taxes due the State from said express company for the years 1887 and 1888, and certain other proceedings *threatened* for collection of like taxes for the year 1889.[1]

[1] Trans., pp. 2–10. All references are to marginal pages.

The case was dismissed as to J. W. Allen, Comptroller, etc., on motion before final hearing, upon the ground that he was not an inhabitant of the district in which the suit was brought.[2]

Upon final hearing, a perpetual injunction prohibiting all proceedings to collect said taxes was awarded against the other defendants, and from that decree they have prosecuted this appeal.

[2] Trans., pp. 20, 37, 38.

STATEMENT.

This cause was determined in the Circuit Court upon the pleadings alone, without the aid of evidence.

Therefore the final decree upon the merits in favor of the complainant can find no support except in the admissions of the answer.

The allegations of the bill that are denied, or merely passed over in silence by the answer, cannot be looked to in support of that decree.[1]

It is essential to a correct understanding of the admissions contained in the answer, and of certain defenses interposed by motion and plea, that the material allegations of the pleadings should be stated.

The bills, original and amended, aver in substance:[2]

That the United States Express Company, "an incorporated joint-stock company," organized in 1854 under the laws of New York, and a resident of that State, has been engaged extensively in conducting an express business—the carriage and de-

[1] *Young* v. *Grundy*, 6 Cranch, 51.

[2] Trans., pp. 2–9, 21–34.

livery of valuable packages—over and upon certain lines of railway, "extending through the States of Ohio, Kentucky, Tennessee, Georgia, Alabama, Mississippi, and Louisiana;" that its business is conducted upon cars furnished by the railway companies for its special use, and which are under the care of its employes; and that, under its contract with the railway companies, it has the exclusive right to conduct all express business upon their lines until December, 1891.

It is further averred that the said express company has established numerous offices along said railway lines, twenty-six of which are within the State of Tennessee, and that "since September 1, 1887, it has been constantly engaged in forwarding articles between those offices (within the State of Tennessee), as well as between those and other offices in different parts of the United States;" and that from purely internal business, done wholly within the State of Tennessee, it has derived, during the years 1887 and 1888, an income of over $11,000.

Said bills aver further that J. W. Allen, Comptroller (and a collector of taxes) of the State of Tennessee, had issued against said express company a distress warrant for the collection of privilege or license taxes of $3,000 per annum, claimed by the State from said company for the years 1887 and 1888; and that said warrant had been placed in the hands of A. Shelton, Sheriff, and S. D. Cate,

Deputy Sheriff, of Hamilton County, Tennessee, who had levied, or were about to levy, the same upon the "property" of said express company. And, further, "that the said Comptroller threatens to issue, and is about to issue and cause to be levied, his warrant for the collection" of a like tax for the year 1889.

Said bills then aver that all said taxes are illegal, and the Tennessee statutes imposing them unconstitutional, as violations of the commerce clause and of the fourteenth amendment of the Federal Constitution.

The material provisions of those statutes are given below.[1]

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[1] It has long been the custom in Tennessee for the Legislature to pass at each biennial session two lengthy acts touching the State revenues—one, known as the "Assessment Act," defines the subjects of taxation, and prescribes mode of assessment, etc.; the other, called the "Revenue Act," fixes rate of taxation upon property, polls, privileges, etc.

The statutes attacked in this case are clauses of the "Revenue Acts" of 1887 and 1889. The full text of the "Revenue Act" of 1887 is given in the Appendix.

That part of the "Revenue Act" of 1887 (Acts 1887, Ch. 1; see Appendix), which is material in this cause, is as follows:

"SEC. 4. *Be it further enacted*, That the rate of taxation on the following privileges shall be as follows (per annum):

* * * * *

"SEC. 5. *Be it further enacted*, That the following corporations shall pay directly to the Comptroller's office the following taxes:

* * * * *

"EXPRESS COMPANIES.

"(In lieu of all other taxes except *ad valorem* tax.)

"If the lines are less than 100 miles long, per annum ---------$1,000 00

"If the lines are over 100 miles long, per annum ---------- 3,000 00

"The above tax only applies to express companies running or doing business on cars or boats, etc.

* * * * *

"SEC. 8. *Be it further enacted*, That any and all parties, firms, or cor-

The original bill stated no grounds for injunction beyond the fact of the mere illegality of the taxes claimed.

The amended bill states none unless it is contained in the following clause, which is quoted in full:

Your orator further shows that the property of the said United States Express Company in Tennessee is employed in interstate commerce in the said express business, and necessary to the conduct of it; that if seized by the said Sheriff, it will greatly embarrass the company in the conduct of such business, and subject it to heavy loss and damage, and the public served by it to great loss and inconvenience.

---

porations exercising any of the foregoing privileges must pay the tax as set forth in this Act for the exercise of said privilege, whether they make a business of it or not, and this Act shall not be so construed as to exempt any person, firm, or corporation whatever exercising any of the foregoing privileges from the payment of the tax herein prescribed for the exercise of said privilege, except as herein provided; and it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the tax prescribed for the exercise of said privileges; and all parties so offending shall be liable for a fine of not less than $50 nor more than $500."

The provisions of the "Revenue Act" of 1889 (Acts of 1889, Ch. 130) are identical with those of the Act of 1887, above quoted, except that the fifth section of the Act of 1889 reads thus:

"SEC. 5. *Be it further enacted*, That the following corporations shall pay directly to the Comptroller's office the following taxes:

* * * * * *

"EXPRESS COMPANIES.

"(In lieu of all taxes, except *ad valorem* tax.)

"If the lines are less than 100 miles long, for one or more packages taken up at one point in this State, and transported to another point in this State, per annum, $1,000. If the lines are more than 100 miles long, for one or more packages taken up at one point in this State, and transported to another point in this State, per annum, $3,000. The above tax only applies to express companies running or doing business on cars or boats, etc."

Your orator further says that * * * the United States Express Company is without adequate remedy at law in the premises.[1]

The bills prayed for injunction to stay all proceedings for collection of said taxes.

It appeared upon the face of the bills that defendant J. W. Allen was not an inhabitant of the district in which the suit was brought, and, upon motion, the case was dismissed as to him, for that cause.[2]

From this decree there is no appeal, and therefore its correctness cannot be questioned in this Court.[3]

Among the causes assigned by motion for dismissal of the suit, and overruled by the Court, were the following:[4]

That no irreparable injury, or other ground of equitable jurisdiction, was shown in the bill; and that there was a "full, adequate, and complete remedy at law," provided by the pay-under-protest statutes of the State.[5]

The same matter of defense was also presented by plea, which was overruled, with leave to rely upon it by answer.[6]

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[1] Trans., p. 32.

[2] Trans., pp. 20, 37, 38.

[3] *Loudon* v. *Taxing District*, 104 U. S., 771; *Gage* v. *Pumpelly*, 115 U. S., 454.

[4] Trans., pp. 19, 20, 53.

[5] Acts 1873, Ch. 44 (see Appendix).

[6] Trans., pp. 18, 19, 54.

The defendants, A. Shelton and S. D. Cate, filed answer, in which, after re-asserting their defenses made by motion and plea, they make the following statements, which are given in full:

And now, without waiving any of said causes or grounds of defense, and for further answer, they say they have no interest whatever in this suit, except that they happened to be officials of Hamilton County, Tennessee—one the Sheriff of said county and the other a Deputy Sheriff—and the chief office of the complainant in Tennessee was in said county, and the distress warrant from the State of Tennessee, issued to collect the taxes complained of, was received by these defendants by virtue alone of their official positions, and they, as it was their duty to do under the law, and as they were bound and required to do under the law, proceeded to obey the mandate of said warrant.

They submit that they are not necessary parties to this suit, nor even proper parties.

They submit further that the leading defendant, J. W. Allen, Comptroller of said State, not now being a party to this suit, the suit having been dismissed as to him, that the complainant cannot now maintain this suit against these defendants, and that the same ought to be dismissed.

They admit that the Acts of 1887 and 1889, referred to in the bill, apply to complainant express company, and that said company has not paid taxes for 1887, 1888, or 1889, and refuses to do so; but they deny that said acts are unconstitutional and in violation of the Constitution of the United States. Particularly is it true of the Act of 1889, for it in no way affects or assumes to affect interstate commerce, but has reference alone to business done within the State of Tennessee. They submit that Tennessee has the right to tax its own internal business, and that for business done wholly within its borders the question of interstate commerce cannot and does not arise.

They deny complainant's right to exemptions from this tax, and submit that the injunction should be disallowed, particularly as to the tax of 1889, under the said Act of 1889; and

this, together with the various other questions made by these defendants, they submit ought to dismiss this suit; and, having fully answered, they pray to be hence dismissed with their cost, etc.

This is the entire *answer*, and there is not an admission contained in it of a single material fact essential to the maintenance of this suit.

There is no admission that complainant was ever engaged in interstate business. There is none that complainant is a non-resident. There is no admission of any fact justifying the interposition of a Court of Equity by injunction. There is no proof of these facts.

So far as can be legitimately inferred from this record, the State of Tennessee may have been endeavoring to collect the taxes in question from one of her own resident corporations, for engaging in purely internal business.

The Circuit Court, on final hearing, enjoined the collection of all said taxes, including those for the year 1889, upon the ground that they were illegal burdens upon interstate commerce. The Court likewise determined that complainant had no adequate remedy at law, and that the bills stated sufficient cause to justify the exercise of the injunctive powers of a Court of Equity.

To prevent misapprehension of appellants' contention, and to define the issue upon that point

sharply and at once, they will concede that the taxes involved are absolutely void if it shall be determined that they are, in fact or in legal effect, burdens upon interstate commerce or any of its instrumentalities.

And, on the other hand, their validity cannot be controverted if it shall appear that they have been laid wholly and alone upon that internal commerce which is within the exclusive jurisdiction of the State, and entirely beyond Federal control.

However, appellants will not concede that mere illegality of the taxes will justify an injunction of proceedings instituted for their collection.

ASSIGNMENT OF ERRORS.

FIRST.

The Circuit Court erred in refusing to dismiss this suit:

(1) For the reason that the material allegations of the bill were neither admitted by the answer nor supported by proof; and

(2) For want of any sufficient averment in the bill to justify the intervention of a Court of Equity to enjoin the collection of taxes; and

(3) For want of necessary parties.

SECOND.

The Circuit Court erred in its construction of the Tennessee statutes of 1887 and 1889, imposing privilege taxes upon express companies, in so far as it held them to embrace and lay taxes upon interstate commerce, in violation of the Federal Constitution:

(1) Neither of said statutes embraces or illegally affects interstate commerce.

That of 1889 is limited, in express and precise terms, to the taxation of internal business; and that of 1887 should be so limited by construction. But,

(2) If said statutes, or either of them, could be properly construed to embrace interstate as well as internal commerce, still—the two classes of business being distinct and separable subjects of legislation—the statutes, though declared void in their application to interstate business, should be enforced as to internal business.

ARGUMENT.

I.

The essential averments of the bill are neither admitted in the answer nor supported by proof.

Conceding the allegations of the bill sufficient to entitle complainant to the relief sought, those allegations are neither admitted in the answer nor supported by proof.

No evidence was heard in this cause.

There is not, in the answer, admission of any material allegation of the bill.

If the answer neither admits nor denies the allegations of the bill, they must be proved on the final hearing.

Young v. Grundy, 6 Cranch, 51.

This is a pure injunction bill. No relief is sought except to stay the collection of State taxes, upon the ground that they are illegal impositions upon interstate commerce, and that their enforcement would cause irreparable injury.

It does not appear, otherwise than by averments of the bill, that complainant's business was, to any extent, interstate commerce.

The meager averments of the bill upon which injunction is sought stand unsupported by a syllable of evidence or the color of an admission.

Without admission or proof of these facts, the decree upon final hearing in complainant's favor is clearly erroneous.

II.

No sufficient cause is averred in the bill for the interposition of a Court of Equity to enjoin the collection of taxes.

Courts of Equity have entertained suits to enjoin the collection of public revenues with caution and reluctance. The reasons are obvious. Government cannot exist without the power to levy and collect taxes; and that power cannot, with safety, be suspended by the Courts at the instance of the tax-payer, except in rare and special cases.

Averment of mere illegality of the tax, and threatened sale of the tax-payer's property for its payment, is not sufficient to justify injunction of proceedings instituted for its collection.

The rule with reference to enjoining the collection of taxes has been frequently stated by this Court.

In *Dows* v. *Chicago*, 11 Wall., 108, a tax upon shares of stock in a national bank had been enjoined upon averment of its illegality.

Mr. Justice Fields said:

The illegality of the tax, and the threatened sale of the shares for its payment, constitute of themselves no ground for such interposition.

In *Union Pacific Railway Company* v. *Cheyenne*, 113 U. S., 525, Mr. Justice Bradley thus states the rule:

It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation.

Continuing, he says:

Judge Cooley fairly sums up the law on this subject as follows: "To entitle a party to relief in equity against an illegal tax, he must, by his bill, bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot of themselves furnish any ground for equitable interposition.

"In ordinary cases a party must find his remedy in the Courts of Law, and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident, or mistake, cases of cloud upon the title of one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these, in proper cases, may be afforded in Courts of Equity." This statement is in general accordance with the decisions of this Court, as well as of many State Courts.

Dows v. Chicago, 11 Wall., 108.
Haumwinkle v. Georgetown, 15 Wall., 547.
State Railroad Tax Cases, 92 U. S., 575.

Assuming, therefore, that there is sufficient

averment of the illegality of the taxes and of threatened sale of property for their satisfaction, there is no ground for injunction stated in the bill.

There is neither truth nor substance in the allegation that enforcement of these taxes would necessitate seizure of property employed in interstate business, and thereby "greatly embarrass the company in the conduct of its business, and subject it to heavy loss and damage, and the public served by it to great loss and inconvenience."

The claim here asserted is in legal effect this: That property employed in interstate business is exempt from seizure under distress warrant or execution for taxes or debts due from the owner; and that this exemption is not dependent upon the continuous and exclusive use of the property in that business, but may arise upon its occasional or partial use therein.

The decision of no Court has yet gone to this length. The results portrayed would, if real, follow upon seizure of property for a legal as well as for an illegal tax, and therefore property employed in interstate commerce could not be seized for legal taxes.

But this entire allegation is a mere pretense. No seizure or sale of property could become *necessary*. The results that complainant affects to apprehend would not follow if such seizure and sale were made. A "simple and effective" remedy

for all the apprehended consequences is provided by statute[1] in Tennessee.

That statute requires one who contests the legality of a tax to pay the amount of it to the collector under protest and sue for its recovery. He is repaid the amount with interest if the tax is declared illegal. The remedy provided by this statute is declared exclusive. Of this statute this Court, in *Tennessee* v. *Sneed*, 96 U. S., 69, said:

> This remedy is simple and effective. A suit at law to recover money unlawfully exacted is as speedy, as easily tried, and less complicated than a proceeding by mandamus (or injunction). Every attorney knows how to carry on the former, while many would be embarrassed by the forms of the latter. Provision is also made for prompt payment of the amount by the State, if judgment is rendered against the officer on the merits.

After stating that the Federal Government "adopts the rule prescribed by the State of Tennessee," the Court adds:

> It (the statute) requires the contestant to pay the amount as fixed by the government, and gives him power to sue the collector, and in such suit to test the legality of the tax. There is nothing illegal, or even harsh, in this. It is a wise and reasonable precaution for the security of government. No government could exist that permitted the collection of its revenues to be delayed by every litigious man or every embarrassed man, to whom delay was more important than payment of costs.

This statute affords the rule by which the State Courts are guided.

Railroad v. State, 8 Heis., 804.
Nashville v. Smith, 86 Tenn., 213.

[1]Acts 1873, Ch 44. (See Appendix.)

Similar State statutes have been repeatedly declared valid by this Court.

South Carolina v. Galliard, 101 U. S., 433.
Antoni v. Greenhow, 107 U. S., 769.
Moore v. Greenhow, 114 U. S., 338.

The Federal statute is almost identical with the Tennessee statute, and has been approved by this Court. *Snyder* v. *Marks*, 109 U. S., 189. Can it be justly said that irreparable injury may result from the operation of these statutes?

Nothing but willful neglect or unreasonable obstinacy of the complainant could defeat the effectiveness of this remedy.

The tax-payer can always compel seizure of his property by neglecting or refusing to pay his taxes.

There is no pretense that complainant was not able, without inconvenience, to pay the amount of taxes claimed. If the taxes proved illegal the effect would be that complainant had loaned the amount to the State pending the contest over the legality of the taxes.

The presumption being in favor of the legality of the tax, why should not the *prima facie* title of the State prevail pending the litigation?

But even seizure and sale of property for the taxes claimed would not cause the inconvenience and loss that complainant affects to apprehend.

The kind of property used by this company in Tennessee—offices and wagons—is very abundant and easily replaced.

The conclusion is that there is no sufficient averment in the bill to justify an injunction.

III.

The necessary parties were not before the Court at the date of the rendition of the final decree.

The State Comptroller is constituted by statute the collector of the privilege taxes imposed upon express companies.[1]

For the collection of the tax due for the year 1889 no steps had been taken. No distress warrant had issued to any one. The object of the bill, as to this tax, was to enjoin the *issuance* of a distress warrant for its collection. The Comptroller alone could have issued that warrant. He was therefore a necessary party, and the only necessary party in this aspect of the case. He was not before the Court at the final hearing, and the final decree, enjoining the collection of this tax, is therefore erroneous and void.

Although the Comptroller had issued distress warrants for the collection of the taxes of 1887 and 1888 to the Sheriff of Hamilton County, he was nevertheless a necessary party to any proceed-

[1] Acts 1887, Ch. 1, Sec. 5 (see Appendix); Acts 1889, Ch. 130, Sec. 5.

ing that sought to have those taxes declared absolutely void and perpetually enjoined.

Such relief should not have been granted unless some officer authorized to represent the State was before the Court.

This was complainant's view of the law, for the Comptroller, though not a resident of the district, was originally made defendant to the bill.

The Sheriff, to whom the distress warrant was issued, had no authority to represent the State.

The Comptroller had such authority, and the statutes had authorized suit, though not by injunction, against him to test the validity of taxes claimed by the State.[1] (See *Osborne* v. *Bank*, 9 Wheaton, 738.)

IV.

The Tennessee statutes of 1887 and 1889 imposing privilege taxes upon express companies do not contravene the commerce clause of the Federal Constitution:

Because—

(1) *Those statutes do not embrace or illegally affect interstate commerce, but cover only such internal commerce as is begun, conducted, and ended wholly within the State.*

[1] Acts 1873, Ch. 44. (See Appendix.)

But—

(2) *If said statutes, or either of them, do embrace, or may apply to, both interstate and internal commerce, the two classes of business are distinct and separable subjects of legislation, and the statutes, though void as to one, are valid as to the other.*

(1)

Do said statutes, or either of them, embrace or illegally affect interstate commerce?

Appellants' contention is that they do not; that the Act of 1889 in *express words*, and that of 1887 by *proper construction*, are limited in their operation to internal business.

Some general observations in reference to the system of taxation adopted in Tennessee will aid materially in the construction of these statutes.

The Constitution of Tennessee imposes rigorous limitations upon the legislative power to tax property and polls, but provides that "the Legislature shall have power to tax merchants, peddlers, and privileges in such manner as they may from time to time direct."[1]

The power of the Legislature to create privileges, and to lay taxes upon them, is absolute and unlimited.

Jenkins v. Ewin, 8 Heis , 477.
Kurth v. State, 86 Tenn., 134.
State v. Schlier, 3 Heis., 281.
Columbia v. Guest, 3 Head. 414.
French v. Baker, 4 Sneed, 193.
Mabry v. Turner, 1 Hum., 93.

[1] Art. II., § 28. (See Appendix.)

The taxation of "privileges" is deeply interwoven with the Tennessee revenue system. From that source more than one-third of the State revenues is derived. It is also a favorite method of the Federal Government for raising revenues. It has been supposed that the burdens of taxation may be more equitably distributed by the exercise of this power.

The taxes complained of in this case were imposed by the general "Revenue Acts" of 1887 and 1889.

Those Acts are very lengthy, and fix the rate of taxation upon property and about seventy "privileges." Among the privileges taxed by these Acts are butchers, boarding-houses, cotton compresses, fruit stands, gas companies, ice dealers, livery stables, lumber dealers, photographers, public parks, vehicles, merchants, litigation, marriage licenses, sleeping-car companies, telephone companies, telegraph companies, and express companies.[1]

Discrimination is not attempted by these statutes, but non-residents and corporations are put upon the same plane with residents and natural persons.

"Any and all parties, firms, or corporations" exercising any of the privileges named in the Acts must pay the tax imposed, "whether they make a business of it or not." (Section 8.)

[1] See Appendix.

The particular parts of said statutes that affect express companies have been already set out.[1]

The State Courts have not construed the particular clauses in question. Had there been a construction by the State Courts, this Court would follow it.

However, the *principles* for the construction of these revenue Acts have been declared by the State Supreme Court in a recent case.

By a clause of the Act of 1887, a privilege tax of $600 per annum was laid upon water companies operating within cities of 40,000 inhabitants. The statute contained no exceptions. It was held, however, that water-works owned by the city itself, and operated for public benefit, were excluded by implication from the operation of the statute, and were not subject to the tax imposed.

The Court, speaking through Judge Caldwell, say:

> Some things are always presumptively exempted from the operation of general revenue laws, because it is reasonable to suppose that they were not within the intent of the Legislature. It cannot be supposed that the Legislature would ever lay the burden of taxation upon public property; therefore, however general may be the enumeration of property for taxation, the reasonable conclusion is that the property held by the State and its municipalities, for governmental purposes, was intended to be excluded, and the law will be administered as excluding it in

[1] See pp. 5, 6, ante.

fact. * * * The exemption most clearly arises, in this case, by implication from the public ownership, public nature, and public use of the property as revealed by the allegations of the petition.

Nashville v. Smith, 86 Tenn., 213, 216.

If property clearly liable to taxation, had the Legislature chosen to tax it, may be thus excluded by implication from the general terms of a revenue statute broad enough to embrace it, upon the ground that the Legislature is not to be held to intend to tax it, because of its public nature, ownership, and use, there would seem to be no difficulty in excluding from the general terms of such statute by like construction subjects that are not within the jurisdiction of the State.

It is to impute folly or ignorance to the Legislature to construe a general revenue statute to embrace subjects not within reach of the State's taxing power.

This the Courts are reluctant to do.

Ogden v. Sanders, 12 Wheat., 212.
Cooley on Const. Lim. (5th Ed.), p. 219.

Is it not "reasonable to suppose" that it was "not within the intent of the Legislature" to tax interstate business, lying entirely beyond the State's jurisdiction, however general may have been the terms of the statute?

If "it cannot be supposed that the Legislature would ever lay the burden of taxation upon public

property," "however general may be the enumeration of property for taxation," can it be supposed that it was intended to tax a subject wholly beyond State jurisdiction?

Is it not "the reasonable conclusion" that subjects not within the State's jurisdiction were "intended to be excluded," and should not the law "be administered as excluding" them?

If the public nature, use, and ownership of property are sufficient reasons for excluding it from the operation of general revenue laws, why is not the fact that the subject does lie within the jurisdiction of the State's taxing power, sufficient for that purpose?

It is an elementary principle of constitutional law that a statute should never be declared unconstitutional unless that result is absolutely unavoidable.

The Court must avoid that result by construction of the statute, if that be possible.

There must be no reasonable doubt of the infirmity of the statute, or the Court will not pronounce its invalidity.

Cooley, Const. Lim. (5th Ed.), p. 218.
Fletcher v. Peck, 6 Cranch, 87.
Townsend v. Sharp, Cooke (Tenn), 300.
Arrington v. Cotton, 1 Bax. (Tenn.), 319.

Undoubtedly the State Courts would have con-

strued the provisions of both the Acts of 1887 and 1889, affecting express companies, to apply to and embrace internal business alone.

This is, moreover, the true construction of both these statutes.

The State authorities do not now, and never have, contended for any other construction.

It is the *tax-payer* who seeks to have such construction put upon the language of the statutes as will destroy them entirely. He seeks to avoid, in this way, not the illegal, but the legal burdens of taxation; not alone the tax upon interstate commerce, but that upon internal business also.

In regard to the Act of 1889, its language leaves no room for doubt or construction.

Its purpose was to define internal business and to lay the tax upon that and nothing else.

If there be such thing as internal business, distinct and separable from interstate commerce, this Act has described it, and confined the tax to that internal business.

This Court has said, in a recent case, "it has often been held, *and there can be no doubt about it*, that there *is* a commerce wholly within the State which is not subject to the constitutional provision."

Railroad v. Mississippi, 133 U. S., 587-595.

If this Act of 1889 does not define with precision this internal business, the existence of which is thus recognized by this Court, then we submit no words or combination of words can accomplish that result.

The Circuit Judge held that this Act excluded interstate business. He said:

"THIS TAX MAY BE AVOIDED SHOULD NO PACKAGES BE BORNE FROM ONE POINT TO ANOTHER IN THE STATE."

This is the crucial test of the character of the statute, and settles beyond dispute that it does not embrace interstate commerce, but covers only internal business.

After it has been determined that the Act of 1889 clearly defines internal business, and taxes that alone, excluding all interstate commerce from its operation, it would seem no Federal question could arise upon this branch of the case.

The other complaints made against this Act of 1889, and the tax imposed by it, depend upon considerations of State policy, in regard to which this Court will follow the decisions of the State Courts.

It is insisted that this tax is unconstitutional because

the entire gross earnings of the company's business for the transportation of packages from one point in the State to an-

other point in the State will not pay the tax exacted by the State for carrying on the business.

* * * * *

This company not receiving net profits enough for packages transmitted from point to point within the State of Tennessee to pay said tax of $3,000, the incidence of the tax must fall on the receipts or profits of the company for business outside the limits of the State.[1]

The answer to this contention is that the Federal Courts cannot afford relief against a State tax that violates no provision of the Federal Constitution or laws, "however unjust, oppressive, and onerous."

Kirtland v. Hotchkiss, 100 U. S., 491.
Memphis Gas-light Co. v. Taxing District, 109 U. S., 398.

Can the constitutionality of the tax, or of the law imposing it, be made to depend upon the ability of the tax-payer to get enough "gross earnings" or "net profits" out of the particular business upon which it laid to pay it? It may be that the Legislature has not levied the tax wisely, or that the tax-payer has not conducted his business successfully, but the validity of a tax cannot be affected by such considerations.

The tax-payer's escape from a losing business is to abandon it.

There is no necessity laid upon this express company to engage in internal business within the State of Tennessee.

[1] Trans., pp. 8, 9.

Can the suggestion that the company may be compelled to apply some of the earnings of its interstate business to the payment of this tax on its internal business have any weight in this connection?

Would the tax be void if the company chooses to pay it out of the earnings of its interstate business, but valid if paid out of funds realized from other sources?

The Circuit Judge held that the tax was laid upon internal business alone, and that its incidental effect upon interstate business did "not necessarily invalidate the tax, perhaps," but declared it void for reasons thus stated:

> But is not this provision of the statute a mere device to fasten the tax upon the company? It is no exercise of the police power of the State. If the tax be paid, it makes not the slightest difference whether the packages taken up and delivered, and carried between and at points in the State, be one or a million. It is not a tax regulated by the amount of business. It is as much if one package be carried as if ten million go. A package of a dime in value carried five miles may involve a license fee of $1,000 or $3,000, depending altogether on the length of the line of transportation used by the company. The length of line used is the measure of the tax. This cannot be the standard.

The answer to this position is conclusive.

This express company was a foreign corporation, that could not engage in internal business within

the State of Tennessee without the consent, either express or implied, of that State.

The State could have excluded it entirely, and therefore could impose such terms as she chose for its admission.

Paul v. Virginia, 8 Wall., 168.
Liverpool & London L. & T. Ins. Co. v. Oliver, 10 Wall., 566.
Ducat v. Chicago, Id., 410.
Cooper Mfg. Co. v. Ferguson, 113 U. S., 727.
Penn. Cent. Sil. M. & M. Co. v. Pennsylvania, 125 U. S., 181.

The terms imposed, if that were material, are such as are laid upon residents of the State, and are entirely within the competency of the State Legislature.

There is no limitation upon the power to tax privileges that are within the State's jurisdiction. (*Ante*, *p.* 21.)

The Legislature may adopt any measure or standard it chooses for this class of taxes.

State v. Schlier, 3 Heis., 281.
Fulghum v. Nashville, 8 Lea, 635

Although the Circuit Judge construed the Act as embracing only internal business, yet he declared it void as "a mere device to fasten the tax upon the company."

Conceding that it is a "device" of that character,

is there any constitutional or other objection to its validity?

So long as the State confines her legislation to subjects within her exclusive jurisdiction, may she not adopt such "devices" lawfully?

The learned Circuit Judge doubtless had in mind a class of decisions of this Court in which State laws were declared unconstitutional, because, under pretense of lawful exercise of police power over the subjects of interstate commerce, they imposed illegal burdens and restrictions upon that commerce.

This line of cases is reviewed by Mr. Justice Harlan in *Minnesota* v. *Barber*, 136 U. S., 317.

They have no application to this case. Here the tax is laid wholly upon internal business. That business is within the exclusive jurisdiction of the State. The Federal Government has no power to control or regulate it to any extent.

If the State must be denied the power to tax its own internal business because the exercise of that power may by possibility affect incidentally interstate commerce, then the State's power in this regard is subjected to Federal control.

One other objection to the validity of this tax will be noticed.

The express company insists that it has rendered this tax illegal as to itself by the method it has adopted for conducting its business.

The company transacts its internal and interstate business by means of the same offices, agents, and wagons.

It admits that it could employ distinct offices, agents, and wagons for each class of business, but insists that it would be inconvenient and expensive for it to do so.

It contends that the fact that it has thus commingled its internal with its interstate business renders it unlawful for the State to tax its internal business, and therefore exempts it entirely from State taxation.

It is obvious that this contention, if sustained, makes the taxation of this company dependent, not upon the legislative will, but upon its own will and choice.

This would invest this company, and all engaged in like business, with the power to evade at will any and all laws devised for taxation of their internal business.

It is clear that this company would be liable for this tax if engaged alone in internal business. Can it create for itself an exemption from State taxation upon its internal business by doing some interstate

business also? How much interstate business will suffice to create the exemption? Would not a single package be sufficient? How can the State prevent this commingling of the two classes of business? If this be a sufficient answer to the claim of the State to tax internal business, would it not likewise be a conclusive answer to the claim of the Federal Government to tax interstate business?

This company not only insists upon the *right* to engage in internal business without paying taxes to the State, but asserts an *exclusive right* to do so along all lines of railway upon which it transacts business.

The bill states:

> Said contract (with the railway companies) provides for the conduct of *all the express business* along said route by said express company (complainant) to the *exclusion of all other companies*, and your orator is advised that said contract contemplates the establishment of offices at all points, and carrying on an express business at and forwarding articles between all points along said route by the express company. Your orator further shows that said contract does not expire until December, 1891.

If sustained in this, the express company can wrest from the State the entire power to tax internal commerce of the character that it conducts.

Telegraph companies, telephone companies, and Pullman car companies could, in like manner, withdraw themselves from all State taxation.

These companies would receive full protection of

State laws, but pay no part of the burdens of State government.

They would compete in internal business without paying taxes with those who did pay taxes.

All that has been said about the tax imposed by the Act of 1889 applies to the tax imposed by the Act of 1887, if the latter Act be *construed* to embrace only internal commerce.

(2)

But if either of said statutes embraces or applies to interstate as well as internal commerce, then, the two subjects being distinct and separable, the statute may be void as to the one and valid as to the other.

The language of the Act of 1889 so clearly embraces and applies to internal business alone that it requires no discussion here.

If it should be determined that the Act of 1887 embraces and applies to interstate as well as internal business, then it is conceded that it is unconstitutional so far as it affects interstate business.

On the other hand, it is contended that the Act is valid in its application to internal business.

The two subjects—interstate commerce and internal commerce—are necessarily distinct and separable. The former is the subject of Federal, and the latter of State, cognizance and regulation.

A statute may be valid as to one of two subjects embraced, though void as to the other, provided the subjects are distinct and separable.

Albany County v. Stanley, 105 U. S., 305.
Bank v. Dudley, 2 Pet., 492.
Packet Co. v. Keokuk, 95 U. S., 80, and other cases.

If there are any exceptions to this rule, they must be cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the Legislature will be defeated it it shall be held valid as to some cases and void as to others.

Cooley on Con. Lim., pp. 215, 216.

There are several decisions of this Court which appear to be directly in point.

In *W. U. Tel. Co.* v. *Texas*, 105 U. S., 460, a State statute that imposed a privilege tax of one cent upon all full-rate, and one-half cent upon all less than full-rate telegraphic messages, was held void as to interstate and valid as to internal business.

The language of the statute was broad and general, covering both classes of business.

Further illustration of the same principle may be found in the following cases:

State Freight Tax Cases, 15 Wall., 232.
W. U. Tel. Co. v. Massachusetts, 125 U. S., 530.
W. U. Tel. Co. v. Pennsylvania, 128 U. S., 39, 40.
Ratterman v. W. U. Tel. Co., 127 U. S., 411.

It would seem that it is the duty of the tax-payer to make the separation between his interstate and internal business. He alone can make that separation.

A fortiori it is his duty not to mingle the two classes of business unnecessarily or fraudulently. If it is not his duty to separate the two classes of business, or not to intermingle them, then he may, by producing confusion, defeat his own taxation.

To avoid this tax it is only necessary to refrain from internal business. Interstate business may be freely prosecuted without paying any tax.

The case of *Leloup* v. *Mobile*, 127 U. S., is not in conflict with appellants' contentions in this case.

In that case the State Court had construed the ordinance to embrace interstate commerce. This Court was concluded by the decision of the State Court upon that point.

In this case it is clear that the State Court would construe the statutes as excluding interstate business.

The plea held sufficient in that case did not show that Leloup engaged in other than interstate business.

The plea, if true, presented an unquestionably good defense.

The sufficiency of that plea was the question involved in that case.

The case is authority for the proposition that a city ordinance imposing a license tax, in general terms, upon telegraph companies is void in its application to a company, or its agent, engaging alone in interstate business.

This is the extent of the *decision*, though the language of the opinion has been supposed to go further.

The case presented by this record is one in which the express company engaged in both internal and interstate business. It could have engaged in either without the other. The question presented is whether it can thus evade the tax laws of the State, and create for itself exemption from State taxation upon its internal business? In that case there was an effort to burden an already overtaxed business. In this case the State merely seeks to reach an internal business, protected by her laws, that is almost, if not entirely, free from any burden of taxation.

Appellants insist the bill should be dismissed, and judgment pronounced in their favor for the taxes enjoined.

G. W. PICKLE,
Attorney-general for the State of Tennessee.

APPENDIX.

[Constitution of 1870.]

ARTICLE II.

SEC. 28. All property, real, personal, or mixed, shall be taxed, but the Legislature may except such as may be held by the State, by counties, cities, or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary, or educational, and shall except one thousand dollars' worth of personal property in the hands of each tax payer, and the direct product of the soil in the hands of the producer and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value. But the Legislature shall have power to tax merchants, peddlers, and privileges in such manner as they may from time to time direct. The portion of a merchant's capital used in the purchase of merchandise sold by him to non-residents and sent beyond the State, shall not be taxed at a rate higher than the *ad valorem* tax on property. The Legislature shall have the power to levy a tax upon incomes derived from stocks and bonds that are not taxed *ad valorem*. All male citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity, shall be liable to a poll-tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll-tax exceeding the amount levied by the State.

(Acts of 1887.)

CHAPTER 1.

AN ACT to provide Revenue for the State of Tennessee, and the counties thereof.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the State tax on every one hundred dollars' worth of taxable property shall be forty-five cents for the year 1887, and for every subsequent year thereafter; thirty cents of which shall be for State purposes, and fifteen (15) cents for school purposes.

SEC. 2. *Be it further enacted*, That the several County Courts of this State be, and they are hereby, authorized and empowered to levy an annual county tax on every one hundred dollars' worth of taxable property, not exceeding the State tax, and exclusive of the tax for public roads and schools, and interest on county debts, and other special purposes; *Provided*, That no county in this State shall levy more than one privilege tax on merchants, and that not more in the aggregate than the privilege tax levied by the State.

SEC. 3. *Be it further enacted*, That all merchants shall pay *ad valorem* tax upon the average capital invested by them of forty-five cents on each one hundred dollars; thirty cents of which shall be for State purposes, and fifteen cents for school purposes, and a privilege tax of thirty cents on each one hundred dollars' worth of taxable property, ten cents of which shall be for school purposes and twenty cents for State purposes; *Provided*, That such privilege tax, without regard to the length of time they do business, shall in no case be less than five dollars, which five dollars is to be paid when the license is taken out, and in case of those whose privilege tax amounts to more than five dollars, the five dollars paid shall be a credit when the balance of the tax is paid.

SEC. 4. *Be it further enacted*, That the rate of taxation on the following privileges shall be as follows (per annum). Where the population is referred to it shall be controlled by and refer to the Federal census of 1880:

ARTISTS AND PHOTOGRAPHERS.

In cities, towns, and taxing districts of over 10,000 inhabitants, each, per annum	$50 00
In cities, towns, and taxing districts of 5,000 to 10,000 inhabitants, each, per annum	25 00
In cities, towns, and taxing districts of 3,000 to 5,000 inhabitants, each, per annum	15 00
In cities, towns, and taxing districts of 1,000 to 3,000 inhabitants, each, per annum	10 00
In cities, towns, and taxing districts of 1,000 inhabitants, each, per annum	6 00
In counties outside of incorporated cities, towns, or taxing districts	5 00
Persons (other than artists and photographers of this State) soliciting pictures to be enlarged outside of this State, each, per annum	10 00

ARCHITECTS, CIVIL AND MINING ENGINEERS.

Architects and civil and mining engineers	25 00

AUCTIONEERS.

In cities, taxing districts, or towns of 40,000 inhabitants or over, each, per annum	50 00
In cities, taxing districts, or towns of 30,000 to 40,000 inhabitants, each, per annum	40 00
In cities, taxing districts, or towns of 20,000 to 30,000 inhabitants, each, per annum	35 00
In cities, taxing districts, or towns of 10,000 to 20,000 inhabitants, each, per annum	25 00
In cities, taxing districts, or towns of 5,000 to 10,000 inhabitants, each, per annum	15 00
In cities, taxing districts, or towns of less than 5,000 inhabitants, each, per annum	10 00

AUCTION AND COMMISSION MERCHANTS.

The same as charged other merchants.

BANKS AND BANKING, AND INSURANCE COMPANIES DOING BANKING BUSINESS.

In cities, taxing districts, or towns of 40,000 inhabitants, or over, each, per annum	$600 00

In cities, taxing districts, or towns of 30,000 to 40,000 inhabitants, each, per annum	$500 00
In cities, taxing districts, or towns of 20,000 to 30,000 inhabitants, each, per annum	350 00
In cities, taxing districts, or towns of 10,000 to 20,000 inhabitants, each, per annum	250 00
In cities, taxing districts, or towns of 5,000 to 10,000 inhabitants, each, per annum	150 00
In cities, taxing districts, or towns of 5,000 inhabitants and under, each, per annum	100 00

BREWERS.

In counties of 60,000 inhabitants, or over, each, per annum	150 00
In counties of less than 60,000 inhabitants, each, per annum	100 00

BROKERS.

(Other than real estate or merchandise, and paying tax as bankers.)

In cities, taxing districts, or towns of 20,000 inhabitants, or over, each, per annum	$300 00
In cities, taxing districts, or towns of 10,000 to 20,000 inhabitants, each, per annum	200 00
In cities, taxing districts, or towns of less than 10,000 inhabitants, each, per annum	100 00

REAL ESTATE BROKERS AND AGENTS.

$25.00 and one per cent. on commissions, and they shall file a bond as required of merchants.

LAND STOCK COMPANIES.

Shall pay a tax of $25.00 and one per cent. per annum on all their commissions made, and shall be required to make quarterly reports to the County Court Clerk of the amount of sales made.

BILL POSTERS.

In cities, taxing districts, or towns of 15,000 inhabitants, or over, each, per annum	$40 00

BUTCHERS.

This includes all offices, stalls, and stores for the sale of fresh meat at retail.

In cities, taxing districts, or towns (or adjacent thereto) of 20,000 inhabitants, or over, each, per annum	$50 00
In cities, taxing districts, or towns (or adjacent thereto) of 10,000 to 20,000 inhabitants, each, per annum	30 00
In cities, taxing districts, or towns (or adjacent thereto) of 5,000 to 10,000 inhabitants, each, per annum	20 00
In cities, taxing districts, or towns (or adjacent thereto) of 1,000 to 5,000 inhabitants, each, per annum	10 00

No tax to be collected from butchers in towns of population of less than 1,000; *Provided*, That nothing in this section shall be construed to include farmers or producers who may sell their own products at wholesale or retail.

BOARDING HOUSES.

Kept for transient customers.

In cities, taxing districts, or towns of 20,000 inhabitants, or over, each room, per annum	$2 00
In cities, taxing districts, or towns of 5,000 to 20,000 inhabitants, each room, per annum	1 50
In cities, taxing districts, or towns of 2,000 to 5,000 inhabitants, each room, per annum	1 00
In cities, taxing districts, or towns of less than 2,000 inhabitants, each room, per annum	50

BILLIARDS.

See games.

CIGAR STANDS.

Charged as other merchants.

COTTON SEED OIL MILLS.

Shall pay on 2 press mill, per annum	20 00
Shall pay on 4 press mill, per annum	40 00

Shall pay on 5 press mill, per annum	$75 00
Shall pay on 6 press mill, per annum	150 00
Shall pay on 7 press mill, per annum.	225 00
Shall pay on 8 press mill, per annum	300 00
Shall pay on 9 press mill, per annum	350 00
Shall pay on 10 press mill, or over, per annum	500 00

COTTON COMPRESSES.

Tax as other property, and compresses pressing one bale and under 20,000 bales, per annum	75 00
20,000 and under 50,000 bales, per annum	100 00
50,000 and under 100,000 bales, per annum	150 00
100,000 and under 200,000 bales, per annum	200 00

And an increase in tax in proportion as the number of bales increases above 200,000 bales.

COMMERCIAL, MERCANTILE, OR MUTUAL PROTECTIVE AGENCIES.

In cities, taxing districts, or towns of 20,000 inhabitants, or over, on each office, per annum	$150 00
In cities, taxing districts, or towns under 20,000 inhabitants, on each office, per annum	100 00

COUNTY CERTIFICATES OR WARRANTS.

Dealers in not paying tax as bankers or brokers.

In cities, taxing districts, or towns of 20,000 to 40,000 inhabitants, or over, each, per annum	$100 00
In cities, taxing districts, or towns of 20,000 to 40,000 inhabitants, each, per annum	50 00
In cities, taxing districts, or towns of 5,000 to 20,000 inhabitants, each, per annum	25 00
In cities, taxing districts, or towns of less than 5,000 inhabitants, each, per annum	12 50

CIRCUSES AND EXHIBITIONS.

Circuses or exhibitions given by any portion of a circus, whether horses are used or not, each day and night, or day or night, each	150 00
Menageries, each day and night, each	150 00
Circuses and menageries combined, each day and night, or day or night, each	150 00

Side shows and other shows and concerts in connection with above, taxed separately under their appropriate heads if they charge a separate or additional entrance fee; sleight of hand and legerdemain, each day and night, or day or night, each	$10 00
Other exhibitions for profit (except circuses, menageries, theaters, etc.), except exhibitions purely for charitable purposes and those given by amateurs or home troupes, each day and night, or day or night, each	10 00
Per month	50 00

COAL AND COKE AGENCIES OR DEALERS.

In towns, cities, or taxing districts of 30,000 inhabitants, or over, each person, firm, agency, or corporation in each county, per annum	50 00
In towns, cities, or taxing districts of over 5,000 and up to 30,000 inhabitants, each person, firm, agency, or corporation in each county, per annum	25 00
In towns, cities, or taxing districts of less than 5,000 inhabitants	Nothing

*COAL OIL AND ILLUMINATING OIL COMPANIES.

Companies, persons, agencies, or firms selling coal or illuminating oils to the trade, or otherwise, manufactured in this State or elsewhere, in counties including cities, taxing districts, or towns of 40,000 inhabitants, or over, each, per annum	$ 1,000 00
In counties, including cities, towns, or taxing districts from 20,000 to 40,000 inhabitants, each, per annum	500 00
In counties including cities, towns, or taxing districts from 10,000 to 20,000 inhabitants, each, per annum	200 00
In counties including cities, towns, or taxing districts from 5,000 to 10,000 inhabitants, each, per annum	100 00
In counties containing cities, towns, or taxing districts of 1,000 to 5,000 inhabitants, each, per annum	50 00
In counties containing cities, towns, or taxing districts of less than 1,000 inhabitants	Nothing

*This clause has been declared unconstitutional.

Provided, That this clause shall not apply to merchants, etc., and retail dealers selling to consumers only; *And provided further*, It shall not apply to manufacturing firms, corporations, or their representatives, now engaged in the manufacturing of oils, greases, and lubricants, or local manufacturing enterprises in this State.

DISTILLERS OF WHISKY AND BRANDY.

Distilleries with a capacity of 30 barrels and over per day, per annum	$150 00
Distilleries with a capacity of from 20 to 30 barrels per day, per annum	100 00
Distilleries with a capacity of from 10 to 20 barrels per day, per annum	75 00
Distilleries with a capacity of from 5 to 10 barrels per day, per annum	50 00
Distilleries with a capacity of from 2 to 5 barrels per day, per annum	5 00

Distillers who manufacture for their own use, and those who sell to consumers, and have paid the State tax levied on wholesale liquor dealers, shall not be required to pay this tax; *Provided*, Said distilleries shall be in operation.

EATING HOUSES.

All public eating houses, except for religious or charitable purposes, each, per annum	$5 00

ELECTRIC LIGHT COMPANIES.

Electric light companies shall be taxed at $1.00 per arc light, per annum, to be paid by the company.

FEES.

All parties, banking associations, or brokers, or their agents, buying, or attempting to buy, the fees of any officer or witness accruing in any of the courts of this State, shall pay tax as follows:

In counties of 40,000 inhabitants or over, each, per annum	$500 00
In counties of less than 40,000 inhabitants, each, per annum	300 00

FERRIES.

Except those run by hand, with oars, when the landings in this State are at or within five miles of taxing districts, cities, or towns.

Cities, towns, or taxing districts of 10,000 inhabitants or over, each, per annum	$50 00
At or within five miles of cities, taxing districts, or towns of 5,000 to 10,000 inhabitants, each, per annum	30 00
At or within five miles of cities, taxing districts, or towns of 1,000 to 5,000 inhabitants, each, per annum	20 00
At or within five miles of cities, taxing districts, or towns of less than 1,000 inhabitants, each, per annum	15 00
All ferries taxable under this Act, more than five miles from a town, city, or taxing district	10 00

FRUIT STANDS.

Taxed as other merchants.

FUTURES.

Each person, firm, company, or corporation dealing therein, and each branch or agency of each firm, company, or corporation, per annum	1,000 00

GAS COMPANIES.

In cities, taxing districts, or towns of 40,000 inhabitants or over, per annum	600 00
In cities, taxing districts, or towns of 20,000 to 40,000 inhabitants, per annum	500 00
In cities, taxing districts, or towns of 10,000 to 20,000 inhabitants, per annum	200 00
In cities, taxing districts, or towns of 5,000 to 10,000 inhabitants, per annum	100 00
In cities, taxing districts, or towns of 500 and less than 5,000 inhabitants, per annum	25 00

GAMES.

Billiard tables, pool tables, flying jennies, bagatelle tables, Jenny Lind tables, and ten-pin alleys, roller coasters, on each, in cities, taxing districts, or towns of 20,000 inhabitants or over, each, per annum.....	$30 00
In cities, taxing districts, or towns from 10,000 to 20,000 inhabitants, each, per annum.....	25 00
In cities, taxing districts, or towns of 5,000 to 10,000 inhabitants, each, per annum	20 00
In cities, taxing districts, or towns of 2,000 to 5,000 inhabitants, each, per annum	15 00
In cities, taxing districts, or towns of less than 2,000 inhabitants, each, per annum	10 00
In counties outside of towns, cities, and taxing districts, each, per annum.....	10 00
All devices used by persons as a source of profit to themselves, such as throwing balls at wooden figures, or any other object, throwing rings, or any other device of like nature.....	10 00

And said tax shall be paid by every saloon-keeper or other person who keeps any of the above in connection with his or her business, and for the use of the public, whether the same is charged for or not.

HOTELS AND TAVERNS.

Each room, except two, per annum.....	$2 00

Hotels kept at places for summer resort to be taxed as other hotels, but may be paid monthly.

HUCKSTERS.

Taxed as other merchants.

Persons who travel around their counties collecting up marketing, chickens, butter, eggs, rags, fruits, etc., and such things as they carry to market, are not subject to a tax either as hucksters or peddlers.

ICE—DEALERS IN.

Each person, or firm, or corporation, selling imported or home ice to the trade—	
In cities, taxing districts, or towns of 40,000 inhabitants or over, per annum...	$100 00

In cities, taxing districts, or towns of 20,000 to 40,000 inhabitants, per annum	$75 00
In cities, taxing districts, or towns of 10,000 to 20,000 inhabitants, per annum	50 00
In cities, taxing districts, or towns of 5,000 to 10,000 inhabitants, per annum	30 00
In cities, taxing districts, or towns of 2,000 and less than 5,000 inhabitants, per annum	20 00
In cities, taxing districts, or towns of 1,000 and less than 2,000 inhabitants, per annum	5 00
Each person or firm retailing or selling ice from any car running upon any railroad in this State (in lieu of all other taxes) to be paid in any county in the State through which the car runs, and in which such sale or sales may be made	50 00
Retail ice dealers running wagons in connection with their business (but in towns of less than 1,000 inhabitants, no tax shall be charged to retail dealers in ice)	10 00

INSURANCE AGENTS.

Each agent of mutual or assessment insurance companies, fire, accident, or life, in each county in which they do business, per annum, to be collected by the County Court Clerk	10 00

But nothing in this Act shall be construed so as to levy a tax upon insurance agents who are legally licensed to do business by the Insurance Commissioner.

ITINERANTS.

All persons, whether physicians or not, either selling medicines or advertising their services, or both, by appearing on the streets, or elsewhere, and making harangues for the purpose of advertising as aforesaid, in each county, per annum	$100 00

INTELLIGENCE OFFICES.

Keepers of each, per annum	40 00

LIGHTNING-ROD DEALERS.

Each, per annum, in each county in which they do business	100 00

LIVERY AND FEED STABLES.

On each stall, per annum	$ 1 00

LIQUOR DEALERS.

Wholesale, each, per annum, and in addition taxed as other merchants	200 00
Retail, taxed as other merchants, and in addition shall pay as follows:	
In cities, taxing districts, or towns of 5,000 inhabitants or over, per annum	200 00
At any place not a city, taxing district, or town, or any city, taxing district, or town of less than 5,000 inhabitants, per annum	150 00

Persons selling liquor in quantities of a quart or more, except manufacturers who sell to be sold again, are wholesale dealers, and persons selling in smaller quantities than a quart are retail dealers; and the above tax on liquor dealers applies to all druggists, except in case of wine for sacramental purposes and alcohol for domestic purposes. Persons keeping a bar on steam-boats, flat-boats, or other vessels or water crafts, shall pay a tax of $300 per annum in lieu of all other taxes, to be paid in any county they may elect.

LITIGATION.

Each suit in law or equity, including applications for partition, to be paid by the unsuccessful party, except in case of partition	$2 50
Each indictment or presentment	5 00
Each appeal to Supreme Court in criminal cases, if defendant is unsuccessful	7 50
Each appeal on writ of error or *certiorari* from a Circuit or Chancery Court to Supreme Court	5 00
Each appeal or *certiorari* from a Justice of the Peace	2 00
Each case submitted under the small offense law	2 00
Each case before a Mayor or Recorder's Court, or before any Police Court having jurisdiction of offenses in any taxing district in the State, provided such tax can be collected in money	1 00

(And said officer collecting said tax on litigation, and in said causes, and under the small offense act, and the officer holding the Police Court in the towns and cities in the taxing districts of this State, shall report the amount collected by them every ninety days, and pay the same over to the Clerk of the County Court, taking duplicate receipts, one of which shall, without delay, be forwarded to the Comptroller.) No tax shall be paid on application for dower or homestead, and no tax on applications of guardians to sell property for maintenance of wards or to entrench on property of wards, and no tax on suits brought by State, county, or municipalities to collect taxes.

LUMBER DEALERS.

Lumber dealers who buy and sell sawed lumber, and dealers in saw-logs and staves, must pay privilege and *ad valorem* tax as merchants.

MARRIAGE LICENSE.

Each (for school purposes, and the tax to be kept in county).....$	1 00

PEDDLERS.

(Buying or selling for profit, or both.)

If on foot, in each county, each, per annum.....	10 00
If with horse or vehicle, in each county, each, per annum	20 00
If with more than one horse, for each additional horse, in each county, each, per annum.....	8 00
Of patent medicines and nostrums, if on foot or horse, in each county, each, per annum.....	40 00
Of patent medicines and nostrums, if with horse and wagon, in each county, each, per annum.....	100 00

PARKS.

Public parks (where visitors are charged an admission fee), each, per annum.....	100 00
Base-ball parks (where an admission fee is charged), per annum	150 00

POOL-SELLING.

Each person, company, firm, or corporation engaged therein, each, per annum.	300 00

PAWN-BROKERS.

In cities, towns, or taxing districts of 40,000 inhabitants, or over, each, per annum	$100 00
In cities, towns, or taxing districts of 30,000 to 40,000 inhabitants, each, per annum	80 00
In cities, towns, or taxing districts of 20,000 to 30,000 inhabitants, each, per annum	70 00
In cities, towns, or taxing districts of 10,000 to 20,000 inhabitants, each, per annum	50 00
In cities, towns, or taxing districts of 5,000 to 10,000 inhabitants, each, per annum	30 00
In cities, towns, or taxing districts under 5,000 inhabitants, each, per annum	20 00
In counties not in towns, cities, or taxing districts	20 00

And in addition they shall pay a tax as other merchants.

PLUMBERS AND GAS FITTERS.

Charged as merchants.

RACE-TRACKS.

Tracks of one mile or more, each, per annum	$200 00
Tracks of half mile, each, per annum	150 00
Tracks of quarter mile, each, per annum	100 00
Book-makers on horse-races, each agent, firm, or person, corporation, or firms in each county, each, per annum	25 00

RAILROAD TICKET AGENTS AND SCALPERS.

Except agents actually on line of railroad.

In cities, towns, and taxing districts of over 20,000, per annum	50 00
In cities, towns, and taxing districts under 20,000, and in counties, per annum	20 00

RESTAURANTS.

Same as hotels on each room, and in addition as follows:

In cities, taxing districts, or towns of 20,000 inhabitants, or over, each, per annum	$50 00
In cities, taxing districts, or towns of 10,000 to 20,000 inhabitants, each, per annum	40 00

In cities, taxing districts, or towns of 5,000 to 10,000 inhabitants, each, per annum	$25 00
In cities, taxing districts, or towns of 2,000 to 5,000 inhabitants, each, per annum	15 00
In cities, taxing districts, or towns of less than 2,000 inhabitants, each, per annum	10 00
In counties not in towns, cities, or taxing or taxing districts	10 00

SAMPLE SELLERS.

Persons selling goods to consumers by sample, or taking orders from consumers by sample, or taking measures, in each county, each, per annum	10 00

SECURITIES.

Dealers in (other than brokers or bankers).	
In cities, towns, or taxing districts of 20,000 inhabitants or over, each, three cents on each dollar employed, but in no instance to be less than, per annum	50 00
In cities, towns, or taxing districts under 20,000 inhabitants, and in counties not in cities, towns, or taxing districts, one and one-half cents on each dollar employed, but in no instance less than, per annum	20 00

SELLING FRUIT TREES AND SHRUBBERY.

Each person, company, or firm, selling fruit trees or shrubbery, for each agent, in each county, per annum	10 00

SELLERS OF GOODS AT PUBLIC OUTCRY.

(Other than auctioneers.)	
Each person, or firm, in each county, per annum	15 00

STOCKS AND BONDS.

Dealers in (other than brokers and bankers). Tax same as dealers in securities.

SHAVING NOTES.

Taxed same as dealers in securities and stocks and bonds.

STREET-CAR COMPANIES.

In cities, towns, or taxing districts of 20,000 inhabitants, or over, each, per annum	$350 00
In cities, towns, or taxing districts of less than 20,000, or over 10,000 inhabitants, each, per annum	150 00
In cities, towns, or taxing districts of under 10,000 inhabitants, each, per annum	50 00

SEWING MACHINES—DEALERS IN OR AGENTS.

Selling sewing machines, either directly or by sample, in counties of 40,000 inhabitants, or over, in each county, each agent and dealer, per annum	20 00
Selling sewing machines, either directly or by sample, in counties of under 40,000 inhabitants, in each county, each, per annum	10 00

(Merchants selling sewing machines upon which they pay a tax as on other merchandise, not to pay the tax required of sellers by sample; *Provided*, They sell the same in any one established business place.)

SKATING RINKS.

In cities, taxing districts, or towns of 20,000 inhabitants, or over, each, per annum	$150 00
In cities, taxing districts, or towns of 10,000 to 20,000 inhabitants, each, per annum	75 00
In cities, taxing districts, or towns of 5,000 to 10,000 inhabitants, each, per annum	40 00
In cities, taxing districts, or towns of less than 5,000 inhabitants, each, per annum	20 00
In counties not in cities, towns, or taxing districts	40 00

SALE STABLES.

Each stall, per annum	1 00

SHOOTING-GALLERIES AND STANDS.

Each, per annum	20 00

STOCK-YARDS AND DEALERS IN STOCK.

Each pen, per annum	10 00

THEATERS.

In cities, taxing districts, or towns of 20,000 inhabitants, or over, each, per annum	500 00

In cities, taxing districts, or towns of 10,000 to 20,000 inhabitants, each, per annum	$300 00
In cities, taxing districts, or towns of 5,000 to 10,000 inhabitants, each, per annum	150 00
In cities, taxing districts, or towns of 3,000 to 5,000 inhabitants, each, per annum	75 00
In cities, taxing districts, or towns of 1,500 to 3,000 inhabitants, each, per annum	25 00
In cities, taxing districts, or towns of less than 1,500 inhabitants, each, per annum	20 00

VARIETY THEATER ESTABLISHMENTS.

Each, per annum	500 00

WATER COMPANIES.

In cities, taxing districts, or towns of 40,000 inhabitants, or over, per annum	600 00
In cities, taxing districts, or towns of 20,000 to 40,000 inhabitants, per annum	400 00
In cities, taxing districts, or towns of 10,000 to 20,000 inhabitants, per annum	200 00
In cities, taxing districts, or towns of 5,000 to 10,000 inhabitants, per annum	100 00
In cities, taxing districts, or towns of 500 and less than 5,000 inhabitants, per annum	50 00

TELEPHONE COMPANIES.

Each telephone box, per annum	50

TELEGRAPH COMPANIES.

For each office or station in a city, taxing district, or town of 40,000 inhabitants, or over, per annum	500 00
In a city, taxing district, or town of 20,000 inhabitants, per annum	300 00
In a city, taxing district, or town of 10,000 to 20,000 inhabitants, per annum	150 00
In a city, taxing district, or town of 5,000 to 10,000 inhabitants, per annum	50 00
In a city, taxing district, or town of 2,000 to 5,000 inhabitants, per annum	10 00

VEHICLES.

If run for profit within the limits of this State, without reference to the residence of the owner, drays, express wagons, and carts (except those of express companies and butchers paying a privilege tax, and except those of farmers or gardeners hauling their own produce; also except those manufacturers hauling their own manufactured articles, except dealers delivering their goods), carts or wagons hauling coal or pig-iron as a business, shall pay, when drawn by one horse, each, per annum.....	$1 00
When drawn by more than one horse, for each additional horse, each, per annum.....	1 00
Hacks, carriages, or wheeled vehicles carrying passengers, that run for profit in this State, without reference to the residence of the owners, when drawn by one or more horses, each, per annum.....	5 00
Omnibuses, and transfer wagons, each, per annum ...	10 00

Hacks, or other vehicles carrying express matter of any character or value, in addition to the above, shall pay a tax of $10 per annum in each county through which they may run.

WAREHOUSEMEN.

Not paying a tax as commission merchants, each, per annum.....	$50 00

And this shall be instead of and cover all taxes for the selling of produce or other articles stored in their warehouses by such warehousemen, but this shall not be so construed to exempt commission merchants from taxation as provided by law; *Provided*, The tax herein levied on such warehousemen shall apply only to those carrrying on business in an incorporated city or town, or a taxing district, provided no tax shall be demanded of warehouses not charging storage.

SEC. 5. *Be it further enacted*, That the following corporations shall pay directly to the Comptroller's office the following taxes, and for the faithful collection of same the Comptroller is hereby required to enter into an additional bond in the penal sum of $100,000, and shall be entitled to a compensation of one and

one-half per cent., to be retained out of such collections, provided no commissions for said collections are allowed other collectors or attorneys:

EXPRESS COMPANIES.

(In lieu of all other taxes except *ad valorem* tax.)

If the lines are less than 100 miles long, per annum, $1,000 00
If the lines are over 100 miles long, per annum..... 3,000 00

The above tax only applies to express companies running or doing business on cars or boats, etc.

RAILROAD COMPANIES.

(Taxed according to statute.)

SLEEPING-CAR COMPANIES.

Each company doing business in the State, on each car, per annum..... .... $500 00

TELEGRAPH COMPANIES.

(Taxed according to statute.)

SEC. 6. *Be it further enacted*, That all insurance companies shall pay directly to the Insurance Commissioner the following taxes in lieu of all other taxes:

Life (foreign), 2½ per cent. on gross premium receipts, payable semi-annually.

Fire (foreign), 2½ per cent. on gross premium receipts, payable semi-annually.

Home fire and life, 1½ per cent. on gross premium receipts, payable semi-annually.

SEC. 7. *Be it further enacted*, That the income derived from all shares of stock in any corporation which are by their charters exempt from an *ad valorem* tax, or from bonds exempt from any such tax, shall pay a tax of five per cent. per annum upon the amount of such income.

SEC. 8. *Be it further enacted*, That any and all parties, firms, or corporations exercising any of the foregoing privileges must pay the tax as set forth in this Act for the exercise of said privilege, whether they make a business of it or not; and this Act shall not be so construed as to exempt any person, firm, or corporation whatever exercising any of the foregoing privileges from the payment of the tax herein prescribed for the exercise

of said privilege, except as herein provided; and it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the tax prescribed for the exercise of said privilege; and all parties so offending shall be liable for a fine of not less than fifty nor more than five hundred dollars.

SEC. 9. *Be it further enacted*, That all laws, or parts of laws, in conflict with this Act be, and the same are hereby, repealed, and that this Act take effect from and after its passage, the public welfare requiring it.

Passed March 26th, 1887.

Z. W. EWING,
Speaker of the Senate.
W. L. CLAPP,
Speaker of the House of Representatives.

Approved March 29th, 1887.

ROBT. L. TAYLOR,
Governor.

[Acts 1873].

CHAPTER 44.

AN ACT to facilitate the Collection of Revenue.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That in all cases in which an officer charged by law with the collection of revenue due the State, shall institute any proceeding or take any steps for the collection of the same, alleged or claimed to be due by said officer from any citizens, the party against whom the proceeding or step is taken shall, if he conceives the same to be unjust or illegal, or against any statute or clause of the Constitution of the State, pay the same under protest, and upon his making such payment the officer or Collector shall pay such revenue into the State Treasury, giving notice at the time of payment to the Comptroller that the same was paid under protest; and the party paying said revenue

may, at any time within thirty days after making said payment, and not longer thereafter, sue the said officer having collected said sum, for the recovery thereof, and the same may be tried in any Court having jurisdiction of the amount and parties, and if it be determined that the same was wrongfully collected as not being due from the said party to the State for any reason going to the merits of the same, then the Court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded, and thereupon the Comptroller shall issue his warrant for the same, which shall be paid in preference to other claims on the Treasury.

SEC. 2. *Be it further enacted*, That there shall be no other remedy in any case of the collection of revenue, or attempt to collect revenue illegally, or attempt to collect revenue in funds only receivable by said officer under the law, the same being other or different funds than such as the tax-payer may tender or claim the right to pay, than that above provided, and no writ for the prevention of the collection of any revenue claimed, or to hinder and delay the collection of the same, shall in anywise issue, either injunction, supersedeas, prohibition, or any other writ or process whatever, but in all cases in which for any reason any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and in no other manner.

SEC. 3. *Be it further enacted*, That in all such cases, if the Court shall certify of record in the cause that it appears from the evidence before the Court that the officer against whom said suit is brought has acted in good faith, and has defended said suit with proper diligence and care, the necessary cost of said cause shall be taxed as now provided by law in criminal causes, and be paid by the State.

SEC. 4. *Be it further enacted*, That in all cases where suits, or actions of any kind, are brought against any person charged by law with the collection of revenue, for the recovery of the tax paid as hereinbefore provided, it shall be the duty of the District Attorney general for the District or Circuit in which the suit shall be brought to attend to the same, and conduct the defense thereof. And in the event the defense is successfully

made, the said Attorney-general shall be entitled to a tax fee of ten dollars ($10), to be taxed to and be paid by the party having brought the action against said officer, but if the Court hearing the cause shall be of opinion, and so determine and adjudge, that the act of the officer was not in good faith, or shall fail to certify, the officer shall pay costs, and shall also pay a tax fee of ten dollars to the Attorney-general.

SEC. 5. *Be it further enacted*, That nothing in this Act shall be so construed or have the effect to subject any officer of the State to any suit for a refusal on his part to accept in payment of revenue to the State any kind or description of funds, or securities or papers other than such as he may be authorized and required to receive for the time being by law.

SEC. 6. *Be it further enacted*, That this Act shall take effect from and after its passage, the public welfare requiring it.

Passed March 20, 1873.

W. S. McGAUGHEY,
Speaker of the House of Representatives.
A. T. LACEY,
Speaker of the Senate.

Approved March 21, 1873.

JOHN C. BROWN,
Governor.

Office Supreme Court, U. S.
FILED,
FEB 25 1891
JAMES H. MCKENNEY
CLERK.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1890.

A. SHELTON, SHERIFF, AND S. D. CATE, DEPUTY SHERIFF, OF HAMILTON COUNTY, TENN., APPELLANTS,

vs.

THOMAS C. PLATT, AS PRESIDENT OF THE UNITED STATES EXPRESS COMPANY, APPELLEE.

NO. 1155.

BRIEF AND ARGUMENT BY
W. G. M. THOMAS,
Solicitor and Counsel for Appellants.

TIMES PRINTING CO., CHATTANOOGA.

made, the said Attorney-general shall be entitled to a tax fee of ten dollars ($10), to be taxed to and be paid by the party having brought the action against said officer, but if the Court hearing the cause shall be of opinion, and so determine and adjudge, that the act of the officer was not in good faith, or shall fail to certify, the officer shall pay costs, and shall also pay a tax fee of ten dollars to the Attorney-general.

SEC. 5. *Be it further enacted*, That nothing in this Act shall be so construed or have the effect to subject any officer of the State to any suit for a refusal on his part to accept in payment of revenue to the State any kind or description of funds, or securities or papers other than such as he may be authorized and required to receive for the time being by law.

SEC. 6. *Be it further enacted*, That this Act shall take effect from and after its passage, the public welfare requiring it.

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UNITED STATES SUPREME COURT.

OCTOBER TERM, 1890.

A. SHELTON, SHERIFF, AND S. D. CATE, DEPUTY SHERIFF, OF HAMILTON COUNTY, TENN., APPELLANTS,

vs.

THOMAS C. PLATT, AS PRESIDENT OF THE UNITED STATES EXPRESS COMPANY, APPELLEE.

NO. 1155.

BRIEF AND ARGUMENT BY
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TIMES PRINTING CO., CHATTANOOGA.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1890.

A. SHELTON, Sheriff, and S. D. CATE, Deputy Sheriff of Hamilton County, Tennessee, Appellants,

vs.

THOMAS C. PLATT, as President of the United States Express Company.

No. 1155.

This is an injunction proceeding on the part of Thomas C. Platt, as President of the United States Express Company, against J. W. Allen, as Comptroller of the State of Tennessee; A. Shelton, as Sheriff, and S. D. Cate, as Deputy Sheriff of Hamilton County, Tennessee, to perpetually enjoin the collection of $9,000 of taxes claimed by the State of Tennessee against that Express Company ($3,000 for each of the years 1887, 1888 and 1889), and the question presented, upon the merits is whether such taxation is legal, in view of

the commerce clause of the Constitution of the United States.†

The record presents a number of questions, outside of the one involving the constitutionality of the tax; and the following brief and argument are directed alone to those questions.

† Trans., 2 and 21.

[All references are made to marginal pages]

STATEMENT.

On September 6th, 1889, Thomas C. Platt, as such President, filed his original bill, and on September 19th, 1889, his amended bill, in the Circuit Court of the United States at Chattanooga, Tennessee, in the Southern Division of the Eastern District of Tennessee, against J. W. Allen, as Comptroller of Tennessee, A. Shelton, as Sheriff of Hamilton County, Tennessee, and S. D. Cate, as Deputy Sheriff of said County. °

The amended bill is simply a re-statement, at more length, and in greater detail, of the allegations of the original bill.

These bills allege that J. W. Allen is a citizen and resident of Davidson County, Tennessee, and Shelton and Cate are citizens of Hamilton County, Tennessee.*

Davidson County, of which J. W. Allen Comptroller, was a citizen and resident, is in the Middle District of Tennessee; and a restraining order, subpœna, and copy of bill were issued to the Marshal of that District, and served at Nashville, Tennessee †

A like order, subpœna and copy of bill issued to the Marshal of the Eastern District for Shelton and Cate, Sheriff

° Trans., 2 and 21.
* Trans. 2.
† Trans. 11.

and Deputy Sheriff, and were served upon them at Chattanooga, Tennessee, the place of the institution of the suit.‡

The restraining orders were returnable September 19th, 1889.‖

The bills allege that Thomas C. Platt is a citizen of the State of New York, and the President of said Express Company, which is a joint stock association of the State of New York; and, by the laws of that State (*which are not embodied but only referred to in the bills*), is authorized to sue in the name of its President; that it was, at the time of the institution of this suit, and for some years theretofore, had been engaged in the express business in Tennessee and other States of the Union—having more than 100 miles of line in Tennessee, and having one line from Cincinnati, Ohio, and through Chattanooga Tennessee, to New Orleans, Louisiana, and all of its lines, as a whole, covering, in the aggregate, 25,000 miles.§

By an Act of the Legislature of Tennessee, approved March 25th, 1887, being Chap. II of the Acts of 1887, it was provided that the occupations and business of an express company should be deemed a privilege, and not pursued or done without a license; and that by another Act of said State, approved March 29th, 1887, being Chap. I of the Acts of 1887, it was provided that the following taxes should be paid by express companies as a tax on such privileges:

"In lieu of all other taxes except *ad valorem* tax.
If the lines are less than 100 miles long, per annum..... $1,000 00

‡ Trans. 13.
‖ Trans. 9.
§ Trans. 2-9, 21-34.

If the lines are over 100 miles long, per annum 3,000 00

"The above tax only applies to express companies running or doing business on cars or steamboats, etc."

By an Act passed April 5th, 1889, being Chap. CXXX, of the Acts of 1889, it is provided that express companies shall pay a tax on their privilege of doing business, as follows:

"In lieu of all other taxes except *ad valorem* tax.

If the lines are less than 100 miles long, for one or more packages taken up at one point in this State, and transported to another point in this State, per annum $1,000 00

If the lines are more than 100 miles long, for one or more packages taken up at one point in this State and transported to another point in this State, per annum 3,000 00

"The above tax only applies to express companies running or doing business on cars or steamboats, etc."

The bills further state that the laws of Tennessee provide that the aforesaid taxes shall be *payable to the Comptroller of the State*, who is empowered by law *to issue his distress warrant* for the collection thereof, and levy on the property of any express company not paying the tax; and that on August 5th, 1889, the Comptroller, J. W. Allen, did issue his distress warrant, addressed to said Sheriff Shelton, commanding him to seize enough of the property of the Express Company to satisfy said taxes for 1887 and 1888, being $6,000, with interest on $3,000 from September 1st, 1887, and interest on $3,000 from September 1st, 1888; and the same came to the hands of said Deputy Sheriff, Cate, who has levied, or is about to levy on the property of said Company; and that the Comptroller, Allen, claims that there is a further $3,000 due from said Company, under the provisions of the aforesaid Act of 1889, and the Comptroller threatens

to issue, and is about to issue, and cause to be levied his warrant for the collection thereof.*

The prayer of the bills is, that the Comptroller, Sheriff and Deputy Sheriff be enjoined from levying on the property of the Company, and from issuing any warrants under said Acts of the Legislature of Tennessee, and from collecting any of the taxes imposed by any of said Acts, etc."†

On the return day of the restraining order, the Comptroller, Sheriff and Deputy Sheriff filed their motion and moved the Court to quash the writ and dismiss the original and amended bills:

FIRST—*Because the suit is brought in a District other than that of which Defendant Allen, Comptroller, is an inhabitant, and other than that in which he was found at the time the writ was served.*

SECOND—*The Complainant seeks to maintain this suit by virtue of a certain alleged Statute of the State of New York, and said Statute is not averred or set out in the bills as required by law.*

THIRD—*Under the public laws of the State of Tennessee, Acts of* 1873, *Chap.* 44, *page* 71, *of which this Court takes judicial notice. Complainant's only remedy is to pay under protest, the taxes complained of, and then sue within thirty days thereafter, to recover the same; and no restraining order or injunction will lie against the collecting officer.*

FOURTH—*The Complainant being a joint stock association*

* Trans. 31, 32.
† Trans. 32.

or partnership, the citizenship of the parties does not affirmatively appear so as to give this Court jurisdiction. It is not shown that the individual members of the association are citizens of States other than Tennessee.

FIFTH—*No irreparable injury or other ground of equitable jurisdiction is shown in the bills. Full and adequate relief may be had at law under the provisions of the said Act of 1873.**

The Court sustained the first ground of motion and dismissed the suit as to J. W. Allen Comptroller, but overruled all the other grounds, and left the case still pending against the Sheriff and Deputy Sheriff.†

A plea, relying upon this pay-under-protest Act of 1873, Chap. 44, page 71, was filed by Defendants, but the same was, by the Court, striken from the file, as insufficient in law.‡

After the dismissal of the bills as to J. W. Allen, Comptroller, the Defendants, A. Shelton, Sheriff, and S. D. Cate, Deputy Sheriff, moved the Court to dismiss the suit:

Because the case having been dismissed as to J. W. Allen, Comptroller, the bills show that they were merely the Sheriff and Deputy Sheriff to whom came the distress warrant, and are not such parties to the cause as will authorize any decree against them, or any such decree as is sought by the bills filed in this cause.§

This motion of Shelton and Cate the Court overruled and disallowed.‖

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* Trans, 19-20.
† Trans. 54.
‡ Trans. 19, 54.
§ Trans. 55.
‖ Trans. 55.

Exceptions were made by the Defendants and entered, to the several actions of the Court in overruling their several motions and plea; and the Court allowed them to rely upon the grounds of said motions and plea in the answer ‡

On December 27th, 1889, Sheriff Shelton and Deputy Sheriff Cate filed their answer, in which they set out in full and rely upon, as a defense, their motion of September 19th, 1889; also, their plea of same date; and their motion of December 27th, 1889, to dismiss the suit because theretofore dismissed as to the Comptroller, J. W. Allen. ‖

As a further answer they say:

"They have no interest whatever in this suit, except that they happened to be the officials of Hamilton County, Tennessee—one the Sheriff and the other the Deputy; and the chief office of the Complainant in Tennessee was in said County, and the distress warrant from the State of Tennessee, issued to collect the taxes complained of, and was received by these Defendants by virtue alone of their official positions; and they, as it was their duty to do under the law, and as they were bound and required to do under the law, proceeded to obey the mandate of said warrant

"They submit that they are not necessary parties to this suit, nor even proper parties.

"They submit, further, that the leading Defendant, J. W. Allen, Comptroller, of said State, not now being a party to this suit—the suit having been dismissed as to him that the Complainant cannot now maintain this suit against these Defendants, and that the same ought to be dismissed."

Without *proof* from either the Complainant or Defendants below, the case was heard by the Court, and a final decree rendered against the Sheriff and Deputy Sheriff, perpetuating the preliminary injunction and perpetually enjoining them from executing the distringas placed in their hands, and

‡ Trans. 54-55.
‖ Trans. 45-48.

adjudging all the costs of the cause against them, and awarding an execution.*

To this decree an exception was taken, and from it an appeal to this Court.†

* Trans. 56.
† Trans. 56.

ASSIGNMENT OF ERRORS.

FIRST.

The Circuit Court erred in overruling the motion of the Comptroller, Sheriff and Deputy Sheriff to dismiss the bills:

FIRST—Because the Appellee, Thos. C. Platt, as President of the United States Express Company, seeks to maintain this suit under an alleged Statute of the State of New York, and that Statute is not averred or set out in either of the bills; nor are the articles of the joint stock association.

SECOND—Because, under the Acts of 1873, Chap. 44, page 71, of the Legislature of the State of Tennessee, the Appellee's only remedy is to pay under protest the taxes complained of, and then sue, within thirty days thereafter, to recover the same.

THIRD—The citizenship of the parties does not affirmatively appear so as to give the Court jurisdiction.

FOURTH—No ground of equitable jurisdiction is shown in the bills. A plain and adequate remedy may be had at law under said Act of 1873.

SECOND.

The Court erred in striking out, as insufficient in law, the plea of the Comptroller, Sheriff and Deputy Sheriff, setting up and relying upon the said Act of 1873, as to paying under protest.

THIRD.

The Court erred in overruling the motion made by the Appellants to dismiss the suit, after it had been dismissed as to the principal Defendant, J. W. Allen, the Comptroller.

FOURTH.

The Court erred in pronouncing a final decree when the only parties defendant were the Sheriff and Deputy Sheriff.

FIFTH.

The Court erred on the final hearing in refusing to dismiss the bills :

FIRST—Because the New York Statute upon which Appellee relies as authorizing a maintenance of this suit in his name as President of the Express Company, is not averred or set out in the bills.

SECOND—Because under the pay-under-protest Act of 1873, Appellee's only remedy is at law under the provisions of that Act.

THIRD—Because the citizenship of the parties does not appear so as to give the Court jurisdiction.

FOURTH—Because under the case as made, Appellee had a full, adequate and complete remedy at law.

ARGUMENT.

FIRST.

(1) *The Express Company cannot maintain this suit in the name of its President.*

It is shown to be a joint stock association or partnership.

Chapman *vs.* Barney, 129 U. S. 677.

The statute of New York under which the Express Company claims the right to sue in the name of its President, is not averred or set forth in the pleadings.

Abbott's U. S. Pr. Vol. 2, p. 63.

An unincorporated association cannot sue in the name of a member or officer, unless its right to do so is shown.

No statute or article of association is set forth in the bills showing any authority to sue in the name of the President.

A foreign statute must be pleaded in order to be relied upon; unless it is shown to be a *public law.*

The language of the original bill is that the Express Company is

"A joint stock company, organized under the Constitution and statute laws of the State of New York, (See Code of Civil Procedure, Section 1919,

and Article 8 Constitution of New York), and domiciled in the State of New York, and authorized by said laws to sue in the name of its President."

The language of the amended bill is :

"Thos. C. Platt, * * * as President of the United States Express Company, and as a member thereof, on behalf of himself, and all the other members thereof, who are too numerous to be joined as parties hereto, brings this bill * * * and says: The United States Express Company is an unincorporated joint stock association, organized in the State of New York, having its principal place of business in the city of New York, and consisting of more than one thousand persons or associates, all of whom have a joint ownership and interest in the cause of action hereinafter set forth. * * * Under and by virtue of the statute laws of the State of New York, hereinafter referred to, the said United States Express Company has the right to sue in the name of its President, in respect to all matters relating to the business and affairs of the said Company; * * * the statutes of the State of New York relating to suits by and against unincorporated joint stock associations are contained in Article 1, Title 5, Chapter XV, of the Code of Civil Procedure, being Sections 1919 to 1931 of Chapter 178 of the Laws of 1880, which your orator now brings into Court and makes a part of this bill of complaint."

The New York laws were only *referred* to in the bills, and were not *brought into Court*, either alone with the pleadings or as evidence.

"In the United States Courts, if the pleader relies on a statute (of whatever nature) enacted by any other State than that in which the Court is held, he should aver it."

Abb. U. S. Pr. Vol. 2, 63.

"An action cannot be maintained for the benefit of an unincorporated society, in the name of a member, merely upon an allegation that the members are extremely numerous; but the complaint must set forth the articles of association to enable the Court to determine whether they had the right of action in the case, and whether the plaintiff named had authority to sue for them.

"A statement that he is specially authorized to do so is not enough."

4 Sand. N. Y. Sup. Ct., 657.

The bills are silent as to whether the New York laws referred to are *public* or *private* laws. They were not produced; and there is no averment that they are *public*.

A law must be public to be judicially noticed by the Court

Covington Drawbridge Co. *vs.* Shepherd, 20 How. 227.

The right of the Express Company to maintain this suit, in the name of its President, was questioned by Appellants in both a motion to dismiss and by their answer.

(2) *The Express Company cannot maintain this suit because of the Tennessee Act of* 1873, *Chap.* 44, *page* 71; *and Appellant's motion to dismiss, upon this ground, should have been sustained by the Circuit Court.*

Under the provisions of this Act, no restraining order will lie against the collecting officer.*

If this statute is not violative of the laws or Constitution of the United States, it will be upheld and enforced by the Federal Courts.

Tennessee *vs.* Sneed, 96 U. S. 69.

Antoni *vs.* Greenhow, 107 U. S. 769.

Poindexter *vs.* Greenhow, 114 U. S. 270.

Allen *vs.* B. & O. R. R. 114 U. S. 311.

Moore vs. Greenhow, 114 U. S. 338.

The Supreme Court of Tennessee has declared this pay-under-protest Act to be constitutional.

* Acts of 1873 Chap. 44. (See Appendix.)

L. & N. R. R. Co. *vs.* The State, etc. 8 Heisk 663.

It is the rule of practice as announced and enforced by the Courts of Tennessee.

"No writ of injunction, supersedeas, prohibition, or other process can lawfully issue for the prevention of the collection of revenue claimed to be due the State."

Nashville *vs.* Smith, 86 Tenn. 213.

It is upheld as constitutional by this Court.

Tennessee *vs.* Sneed, 96 U. S. 69.

The rule announced by the Federal Court is, that all State legislation of the character of this Act of 1873, is enforced by the Federal Courts, unless such impairs, in some way, the obligation of a contract, or deprives, in some way, a subject of a right accorded to him by the Constitution and laws of the United States.

It is not necessary to ask the question whether this Act impairs the obligation of a contract between the Express Company and the State of Tennessee. There is no contract. Therefore none could be impaired.

"Whatever belongs to the remedy, may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract."

Bronson *vs.* Kinzie, 1 How. 316.

"It is difficult to see why, if the Legislature may prescribe a limitation where none existed before, it may not change one which had already been established, * * * and as to the form of action, or mode of remedy, it is well settled that the Legislature may change them at its discretion, provided, *adequate means of enforcing the right remains.* In all such cases, the question is one of *reasonableness.* * * * Of that the Legislature is, primarily, the

judge; and we cannot overrule the decision of that department of the government unless a palpable error has been committed."

Terry *vs.* Anderson, 95 U. S. 633.

Poindexter vs *Greenhow*, 114 U S. 270, presents a case in which Virginia, by an Act of 1871. provided for funding its debt and issuing bonds therefor, and that the coupons of such bonds should "be receivable for all taxes, debts, dues and demands due to the State." Under this Act, a number of the creditors of the State accepted these bonds and coupons in satisfaction of other bonds held by them.

This Court held that a contract was thus consummated between Virginia and these holders of the new bonds and coupons, from the obligation of which the State could not, without the bondholders' consent, release herself by any subsequent legislation. By virtue of this Virginia Act of 1871, these coupons were reduced, in effect, to money; and that, as between the State and its taxpayers, were as legal tender as money, and it was the legal duty of every tax collector to receive these coupons offered by taxpayers, in payment of taxes, upon an equal footing, at an equal value, and with equal effect as though they were gold or silver or legal tender tr asury notes; and that after a tender of such coupons by a taxpayer, in payment of taxes, and a refusal of a tax collector to receive them, the situation and rights of the taxpayer and coupon-holder were precisely what they would have been, had he made a like tender in gold coin, and it had been refused.

After the Act of 1871, and in 1882. Virginia passed a law similar to our Act of 1873

A taxpayer tendered to a tax collector these coupons in

payment of his tax, and the collector refused to accept them, and levied on certain property of the taxpayer. The taxpayer then brought detinue against the collector. The collecto relied, as a defense upon the pay-under-protest statute.

Upon this question, Justice Mathews said:

"His (the taxpayer's) right was to have his coupons received for taxes, when offered. That was the contract. To refuse to receive them was an open breach of its obligation. It is no remedy for this that he may acquiesce in the wrong, pay his taxes in money, when he is entitled to pay in coupons, and bring suit to recover it back. His tender, as we have already seen, was equivalent to payment, so far as it concerns the legality of all subsequent steps by the collector to enforce payment by distraint on his property. He has the right to say that he will not pay the second time, even for the privilege of recovering it back. And if he chooses to stand upon a lawful payment, once made, he asks no remedy to recover back, taxes illegally collected, but may resist the exaction and treat as a wrongdoer, the officer who seizes his property to enforce it."

It will be seen, that the Court placed its decision upon the ground that the taxpayer, by his tender of the coupons, had, *in effect, tendered the money*, and was equivalent to *payment*, and he was not bound to pay the *second time*. And further, that the Virginia Act, providing for payment under protest, *impaired the obligation of the contract previously* made between Virginia and the taxpayers; and for this reason, alone, the Act was unconstitutional.

If there had been no *previous contract* that these coupons should be receivable for taxes; and if such coupons had not been once *tendered* and the *tender refused*, the opinion of the Court would have been to remit the taxpayer to his remedy provided by the Virginia Act.

The Circuit Judge predicated his opinion, in overruling

this ground of motion, upon *Poindexter* vs. *Greenhow*, saying, it "*is decisive of the point made.*"

The Act of 1873 was before this Court in Tennessee *vs.* Sneed 95 U. S. 69, and in that case the Court said:

"We think that the regulation of the statute gave him abundant means of enforcing such right as he possessed. It provided that he might pay his claim to the collector, under protest, giving notice thereof to the Comptroller of the Treasury, that, at any time within thirty days thereafter, he might sue the officer making the collection; that the case should be tried by any Court having jurisdiction, and if found in favor of the plaintiff on the merits, the Court should certify that the same was wrongfully paid, and ought to be refunded, and the Comptroller should thereupon issue his warrant therefor, which should be paid in preference to other claims on the treasury. The remedy is simple and effective. A suit at law to recover money unlawfully exacted is as speedy, as easily tried, and less complicated than a proceeding by mandamus."

The Court continues its opinion by stating that the United States in its revenue laws

"Adopts the rule prescribed by the statute of Tennessee. It requires the contestant to pay the amount as fixed by the Government, and gives him power to sue the collector, and in such suit, to test the legality of the law. There is nothing illegal or harsh in this. It is a wise and reasonable precaution for the security of the Government. No government could exist that permitted the collection of its revenues to be delayed by every litigious man, or embarrassed man to whom delay was more important than the payment of costs."

Waite, C. J., in *Antoni* vs. *Greenhow*, 107 U S. 769, affirms this case of Tennessee *vs.* Sneed:

"We might have satisfied ourselves by a reference to the case of Tennessee *vs.* Sneed, where the same general principle was before us; but as we have been asked to reconsider that case, we have done so with the same result, and, as we think, without, in any manner, departing from the long line of cases in which the principle involved has been recognized and applied."

The deduction from the foregoing cases is:

First—There is no *contract* between Tennessee and Appellee.

Second—If one existed, this Act would not *impair* it.

Third—*Adequate means* of enforcing the right remains to Appellee outside of a Court of equity.

Fourth—The remedy under the Act is *simple*, *effective* and *reasonable*.

Fifth—The Court will not interfere with that remedy unless the State Legislature committed a *palpable error*.

But it may be insisted that this Act operates to divest the Federal Courts of equity—of jurisdiction to enjoin the collection of taxes, and that statutes of the State cannot limit the jurisdiction of the equity courts of the United States.

The answer to this is, that if Appellee *has* an adequate and reasonable remedy at law, it has, then, *no relief in a Court of Equity*.

Some ground of equitable jurisdiction must appear, otherwise it will be remitted to its remedy in the Court of law.

This will be mentioned further hereinafter.*

(3) *In so far as the jurisdiction may depend upon citizenship of the parties, it must fail.*

Appellee is not a corporation, but a joint stock association, which, in fact, is a mere partnership

* See Post, paragraph 4 of First Error, page 17.

"On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is, that the United States Express Company is a joint stock company organized under the law of the State of New York, and is a citizen of that State. But the Express Company cannot be a citizen of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the Company was organized under the laws of New York, is not an allegation that it is a corporation, but a joint stock company—that is, a mere partnership. And, although it may be authorized by the laws of the State of New York to bring suit in the name of its President, that fact cannot give the Company power, by that name, to sue in a Federal Court."

Chapman *vs.* Barney, 129 U. S. 677.

(4) *No ground of equitable jurisdiction is shown in the bills.*

The entire allegations of both original and amended bills embracing matters of equitable cognizance are contained in the following:

"Your orator further shows that the property of said United States Express Company in Tennessee is employed in interstate commerce in the said express business, and necessary to the conduct of it; that if seized by said Sheriff it will greatly embarrass the Company in the conduct of such business and subject it to heavy loss and damage, and the public served by it to great loss and inconvenience.

"Your orator further says that your orator and the United States Express Company are without adequate remedy at law in the premises."

However *illegal* the tax may be, that fact, of itself, is no ground for an injunction bill.

Hannewinkle *vs.* Georgetown, 15 Wall. 547.

Nor will the *threatened sale* of property to pay such tax furnish ground for equitable interposition.

Dows *vs.* Chicago, 11 Wall, 108,

No *special circumstances* exist, and none are averred or

proven which bring the case under any of the *recognized heads* of equity jurisdiction

The allegations of the bills embrace only:

First—Illegality of the tax.

Second—Threatened sale of property, and the consequent losses and inconvenience.

These two allegations are followed by the unsupported statement, that

"Your orator and the United States Express Company are without adequate remedy at law."

Dows vs. *Chicago*, 11 Wall. 108, was a bill originating in the Federal Court to restrain the collection of a tax levied by Chicago upon shares of stock of a National bank.

Justice Field, after stating the rule to be that *illegality* of the tax and *threatened sale* of property for its payment constitute, of themselves alone, no ground for interposition of a Court of equity by injunction, and that there must be some *special circumstances* bringing the case under some *recognized head of equity* jurisdiction, before the preventive remedy of injunction can be involved, says:

"The equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case, at least in the Federal Courts, where there is a plain and adequate remedy at law. And except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy either by action against the officer making the collection, or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff, protesting against its enforcement, might have had his action, after it was paid, against the officer or city to recover back the money, or he

might have prosecuted either for his damages No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action."

Dows vs. *Chicago* was affirmed by *Hannewinkle* vs. *Georgetown*, 15 Wall. 547, Justice Hunt delivering the opinion of the Court.

This same doctrine was re-announced in *Union Pacific R'y vs. Cheyenne*, 113 U. S., 525, in which Judge Bradly says:

"It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegalily of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation."

SECOND.

The plea relying upon this pay-under-protest Act of 1873, *should have been sustained by the Court.*

The discussion under Paragraph 2, of the first error assigned, is referred to without repetition.*

THIRD.

A necessary party was not before the Court, after the suit had been dismissed as to J. W. Allen the Comptroller; and an error was committed by the Court in refusing to dismiss the suit, on motion made, at that stage of the proceeding.

The bills seek to restrain the Comptroller, Sheriff and Deputy from levying, or endeavoring to levy on the property of the Company, under the warrant issued for the taxes of 1887 and 1888, or any other warrant issued, or to be issued

* See ante 11.

for the taxes for 1889, or any other year, under the several Acts of the Legislature of Tennessee, and from collecting or endeavoring to collect the taxes imposed by said Acts.*

The Comptroller had issued a distress warrant for the taxes of 1887 and 1888; but none had been issued for 1889. But the allegation of the bills is, that he threatens to issue, and cause to be levied his warrant for the tax of 1889 †

The Sheriff and Deputy who were alone, before the Court when the motion to dismiss was made, had no distress warrant for the 1889 tax, and none had been issued in fact; and the warrant for the taxes of 1887 and 1888, was in their hands as *officials*, merely, and they were before the Court only in the capacity of *officials*.

The Comptroller, *by whom* the warrant had been issued; *to whom* the taxes were payable; and *in whom* the law had vested the authority to issue such warrant, was not a party to the suit.

It was error to keep the suit pending against the Sheriff and Deputy, after it had been dismissed as to the Comptroller.

FOURTH.

The Court erred in pronouncing a final decree against the Sheriff and the Deputy Sheriff. The Comptroller was a necessary party.

The language of the bills is:

"It is further provided by the laws of Tennessee, that the aforesaid

* Trans. 31, 32.
† Trans. 31.

taxes shall be payable to the Comptroller of the State, who is empowered by said laws, as your orator is advised, to issue his distress warrant for the collection thereof, and to levy upon the property of any express company not paying the tax."‡

A distress warrant is "due process of law."

Myers *vs.* Parks, 8 Heisks, (Tenn) 550.

Murrray's Lessees *vs* Hoboken Co , 18 How. 282.

A distress warrant is in the nature both a judgment and execution.

Scovel *vs.* Mayor, Nashville, (Tenn.,) 1877.

Mayor *vs.* Pearl, 11 Hump, (Tenn ,) 249.

A bill filed to enjoin proceedings on a judgment and execution must make the *plaintiff* in the execution a party

Blanton v. Hall.

~~Shaw, Barbour & Co , *vs.* Armstrong~~, 2 Heisk, (Tenn.,) 423

In *Marshall vs. Beverly*, 5 Wheat, 313, a bill was filed for a perpetual injunction against judgmen's obtained on certain bills of exchange drawn by the plaintiff and negotiated to the defendant, and which had subsequently passed from the latter into the hands of third persons, by and in favor of whom the judgments were obtained.

The plaintiffs in these judgments were not brought before the Court and made parties defendant to the bill; and were not before the Court when the final decree was pronounced perpetually enjoining the judgments.

This Court declared the decree to be erroneous, because the *plaintiffs in the judgments* were not before the Court.

‡ Trans. 25.

In *Montgomery vs. Whitworth*, I Tenn., Ch. R, 174, Chancellor Cooper held:

"He (the Sheriff) is a public officer, bound, as such, to obey the mandates of this Court whether he is a party to the suit or not. It is only when an officer has made himself individually liable to the suitor, and the object of the complainant is to obtain a personal decree upon such liability, that public officers should be made defendants. In all other cases, it is a useless form. *For it has long been the law of the State that no valid decree can be pronounced against the officer, who is simply made defendant in his official capacity*, although the bill be taken for confessed against him. McGavock vs. Elliott, 3 Yer. 375. An officer is often made a defendant to the bill upon the idea that it is necessary that he should be a party in order to make effectual service upon him of an injunction or other extraordinary process. But this is a mistake."

"The rule in equity as to parties defendant is, that all whose interests will be affected by the decree sought to be obtained, must be before the Court; and if any such persons cannot be reached by process—do not voluntarily appear, or from a jurisdictional objection going to the person in the courts of the United States, cannot be made parties - the bill must he dismissed"

Ribon *vs.* Railroad Companies, 16 Wall. 450.

"This Court has repeatedly had occasion to determine, that where necessary, parties to bills could not be brought into the Federal Court by reason of the constitutional limitation on their jurisdiction, the suit must be dismissed. The jurisdiction on this point has never varied, and the decisions are numerous. Where parties are merely formal, the Court will dispense with their presence, but will never assume jurisdiction over them."

Shields *vs.* Barrow, 17. How. 132.

The action of the Circuit Court in pronouncing a final decree against appellants, cannot be sustained upon the theory that the appellants were the *agents* of the Comptroller of the State.

A sheriff, in executing process, is a public agent. He is the agent of the law.

Murfree on Sheriffs, Sec. 189.

Am. & Eng. Enc. of Law, Vol. I, 395.

Were he the agent of the plaintiff in an execution, every principle of law governing his liability to the plaintiff, and the liability of his bondsmen to the plaintiff, would be over-turned.

FIFTH.

The Court committed the same errors upon final decree, as were committed in overruling the motion mentioned in the first assignment of error, hereinbefore.

To avoid repetition, the discussion under that assignment of error is referred to, in support of this *

Finally, even if it were conceded that the bills might be maintained, provided there was proof to support the allegations, the suit, never-the-less, must be dismissed, as the case stands wholly without proof.

It is submitted, respectfully that the appellee must fail.

G. W. Pickle a

W. G. M. THOMAS,

Solicitor and Counsel for Appellants.

* Ante 8, 19.

APPENDIX.

[Acts 1873].

CHAPTER 44.

AN ACT to facilitate the Collection of Revenue.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That in all cases in which an officer charged by law with the collection of revenue due the State, shall institute any proceeding or take any steps for the collection of the same, alleged or claimed to be due by said officer from any citizens, the party against whom the proceeding or step taken shall, if he conceives the same to be unjust or illegal, or against any statute or clause of the Constitution of the State, pay the same under protest, and upon his making such payment the officer or Collector shall pay such revenue into the State Treasury, giving notice at the time of payment to the Comptroller that the same was paid under protest; and the party paying said revenue may, at any time within thirty days after making said payment, and not longer thereafter, sue the said officer having collected said sum, for the recovery thereof, and the same may be tried in any Court having jurisdiction of the amount and parties, and if it be determined that the same was wrongfully collected as not being due from the said party to the State for any reason going to the merits of the same, then the Court trying the case may certify of record that the same was wrongfully paid, and ought to be

refunded, and thereupon the Comptroller shall issue his warrant for the same, which shall be paid in preference to other claims on the Treasury.

SEC. 2. *Be it further enacted*, That there shall be no other remedy in any case of the collection of revenue, or attempt to collect revenue illegally, or attempt to collect revenue in funds only receivable by said officer under the law, the same being other or different funds than such as the taxpayer may tender or claim the right to pay, than that above provided, and no writ for the prevention of the collection of any revenue claimed, or to hinder and delay the collection of the same, shall in anywise issue, either injunction, supersedeas, prohibition, or any other writ or process whatever, but in all cases in which for any reason any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and in no other manner.

SEC. 3. *Be it further enacted*, That in all such cases, if the Court shall certify of record in the cause that it appears from the evidence before the Court that the officer against whom said suit is brought has acted in good faith, and has defended said suit with proper diligence and care, the necessary cost of said cause shall be taxed as now provided by law in criminal causes, and be paid by the State.

SEC. 4. *Be it further enacted*, That in all cases where suits, or actions of any kind, are brought against any person charged by law with the collection of revenue, for the recovery of the tax paid as hereinbefore provided, it shall be the duty of the District Attorney General for the District or Circuit in which the suit shall be brought to attend to the same, and

conduct the defense thereof. And in the event the defense is successfully made, the said Attorney General shall be entitled to a tax fee of ten dollars ($10), to be taxed to and be paid by the party having brought the action against said officer, but if the Court hearing the cause shall be of opinion, and so determine and adjudge, that the act of the officer was not in good faith, or shall fail to certify, the officer shall pay costs, and shall also pay a tax fee of ten dollars to the Attorney General.

SEC. 5. *Be it further enacted*, That nothing in this Act shall be so construed or have the effect to subject any officer of the State to any suit for a refusal on his part to accept in payment of revenue to the State any kind or description of funds, or securities or papers other than such as he may be authorized and required to receive for the time being by law.

SEC. 6. *Be it further enacted*, That this Act shall take effect from and after its passage, the public welfare requiring it.

Passed March 20, 1873.

W. S. McGAUGHEY,
Speaker of the House of Representatives.

A. T. LACEY,
Speaker of the Senate.

Approved March 21, 1873.

JOHN C. BROWN,
Governor.

Office Supreme Court U. S.
FILED,
MAR 3 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE UNITED STATES.

A. SHELTON, SHERIFF, AND S. D. CATE, DEPUTY SHERIFF OF HAMILTON COUNTY, TENNESSEE,

Appellants.

against

THOMAS C. PLATT, AS PRESIDENT OF THE UNITED STATES EXPRESS COMPANY,

Appellee.

No. 1155.
October Term,
1890.

Brief on behalf of Appellee.

WILLIAM PARKIN,
W. W. MACFARLAND,
Of Counsel.

Supreme Court

OF THE UNITED STATES.

A. SHELTON, Sheriff, and S. D. CATE, Deputy Sheriff, of Hamilton County, Tennessee,

Appellants,

against

THOMAS C. PLATT, as President of The United States Express Company,

Appellee.

Brief on Behalf of the Appellee.

The appellee is a joint stock company, consisting of more than one thousand associates, and brought this suit in the name of its president on behalf of the whole body of associates. The object of the suit was to restrain and enjoin the collection of a license tax levied upon the express company under a statute of the State of Tennessee, which tax is alleged to be void. It was adjudged to be void by the Circuit Court, and from the final decree of that court granting a permanent injunction this appeal was taken.

At the hearing the bill was dismissed, on mo-

tion, as to the Comptroller alone, on the ground that he was not a resident of the district, as will appear by the opinion. But he was not a necessary party, as the Court points out, the Sheriff and his deputy being the officers designated by law for the collection of the tax (page 20).

A motion was also made to dismiss on the ground that the statute of the State provided that the tax must be paid before any suit could be maintained to test its validity. But the Court points out in its opinion that if that part of the statute which levies the tax is void, the subsequent part requiring the payment of the tax as a condition is also and necessarily void, referring to the decision of this Court in Poindexter *v.* Greenhow, 114 U. S., 270. This conclusion, being the necessary result of principle and authority the point does not seem to call for further observation here.

The legislation in question is as follows:

An act of the Legislature of Tennessee declares "that the occupations and business transactions that shall be deemed privileges and be taxed and not pursued or done without license, are the following, viz., * * express companies." (Laws of 1887, Chap. 2, Sec. 50.)

An act of the same session, passed a few days later, provides "that the following corporations shall pay directly to the Comptroller's office the following taxes, * * express companies (in lieu of all other taxes except *ad valorem* tax); if the lines are less than 100 miles long, per annum, $1,000; if the lines are over 100 miles long, per annum, $3,000. The above tax only applies to express companies running or doing business on cars or boats, etc." (Laws of 1887, Chap. I, Sec 5.)

Neither act had any relation to lines of transportation existing, or business carried on, wholly within the State. It was also provided as follows: "That any and all parties, firms or corporations,

exercising any of the foregoing privileges must pay the tax as set forth in this Act, for the exercise of said privilege, whether they make a business of it or not; * * and it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the tax prescribed for the exercise of said privileges." (Chap. I, Sec. 8.)

In 1889 an act was passed (Chapter 130) providing as follows: "That the following corporations shall pay directly to the Comptroller's office the following taxes, * * . (In lieu of all other taxes, except *ad valorem* tax), if the lines are less than a hundred miles long (for one or more packages taken up at one point in this State and transported to another point in this State), per annum, $1,000; if the lines are more than one hundred miles long (for one or more packages taken up at one point in this State and transported to another point in this State), per annum, $3,000. The above tax only applies to express companies running or doing business on cars or boats." (Laws 1889, Chap. 130, Sec. 5.) The eighth section of the Act is the same as the corresponding section of the Act of 1887.

It appears by the bill, and it is admitted, that the complainant company is one of the large express companies carrying on business in and through all the States and Territories of the United States, as well as foreign countries, and maintains offices and carries on its business in the State of Tennessee, although its business within the borders of that State is comparatively very small. The offices maintained there are subsidiary and necessary to its through business, and would have to be maintained if it carried on no merely local business. The company's lines of transportation by rail and by water of course exceed by many times one hundred miles in length (pp. 13, 14, 16).

It appears by the thirteenth paragraph of the bill that the taxes in question are for the years 1887, 1888 and 1889 at the statutory rate above mentioned.

It appears by the twelfth paragraph of the bill, and is not denied, that the whole net revenue derived by the company from business carried on within the State during the period covered by the tax, would not be sufficient to pay it, and indeed that substantially the whole tax would necessarily fall upon its inter-State and foreign business (p. 16).

ARGUMENT.

First.—*The remedy by injunction is proper.*

It is well settled that a court of equity has jurisdiction to enjoin against the collection of a tax when the tax is wholly illegal and void.

It is not contended that this jurisdiction extends to cases of mere irregularity, nor is it necessary to maintain that it extends to cases where a tax is partly good and partly void, and there is no way of separating the good from the bad. For all the purposes of this case, it is only necessary to maintain that the jurisdiction exists and has been uniformly exercised in the Federal Courts, where the whole tax is illegal and void.

The precise question came under discussion in this Court, in Allen *v.* Baltimore and Ohio Railroad Company (114 U. S., 311). The Railroad company had tendered to the proper officer of the State of Virginia interest coupons of bonds of that State in payment of taxes. The tender was refused and a levy threatened for the collection of the tax. Thereupon a bill for an injunction was filed by the railroad company against Allen, the Auditor, Revely, Treasurer of the State, and Hamilton, Treasurer of Augusta County, in that State. The Court held, following a former decision, that the tender was good and should have been accepted. The question then arose, whether the complainant was entitled to relief in a court of equity.

The Court say: "The general questions arising and argued in this and other cases involving them are fully discussed in the opinion in the case of Poindexter *v.* Greenhow. The conclusions reached in that judgment apply to the present appeal, and require that the decree of the Circuit Court should be affirmed. It is deemed proper to add a few observations on the question of the jurisdiction of the Circuit Courts in such cases in equity to grant relief by injunction."

The opinion proceeds: "The circumstances of this case bring it, so far as that remedy is in question, fully within the principle established in this Court by the decision in Osborne *v.* The Bank of the United States (9 Wheat., 739), and within the terms of the rule as declared in Cummings *v.* National Bank (101 U. S., 153), quoted in the case of Poindexter *v.* Greenhow."

Osborne *v.* The Bank of the United States was the case of an illegal tax imposed upon the bank. The Court say: "A State cannot tax the Bank of the United States, and any attempt on the part of its agents and officers to enforce the collection of such a tax against the property of the bank may be restrained by an injunction from the Circuit Court."

Cummings *v.* National Bank was the case of a tax declared to be illegal because it violated a provision of the Constitution of the State of Ohio, relating to equality of taxation, the bank claiming that the tax imposed upon its shares was illegal, because relatively greater than that imposed upon other property. The bill was brought to enjoin the Treasurer of Lucas County against the collection of the tax. It was sustained, and an injunction issued. A statute of the State was referred to in the opinion as strengthening, if need be, the jurisdiction of equity, but it was held not to be necessary, and the decision was rested upon broad general principles (pp. 157, 158).

In Dodge *v.* Woolsey (18 How., 331), cited in

Allen *v.* Baltimore and Ohio Railroad Company in support of the rule there laid down, a stockholder was permitted to file a bill to prevent the collection of an illegal tax because the directors neglected to do so.

In the opinion of Allen *v.* Baltimore and Ohio Railroad Company, it will be observed that the State Railroad Tax Cases (92 U. S., 575) are distinguished, and the following paragraph is quoted from the opinion in the tax cases:

"In the examination which we have made of these cases, we do not find any of the matters complained of to come within the rule we have laid down as justifying the interposition of a court of equity. There is no fraud proved, if alleged. There is *no violation of the Constitution*, either in the statute or in its administration by the Board of Equalization. *No property is taxed that is not legally liable to taxation*, nor is the rule of uniformity prescribed by the Constitution violated."

Then the Court say: "*If the facts here negatived had been affirmed, the converse of the rule would have been equally applicable.*"

In Transportation Company against Parkersburg, also referred to in Allen *v.* Baltimore and Ohio Railroad Company, it was held that a bill would lie to restrain the collection of illegal wharfage.

Jurisdiction was sustained in Tomlinson *v.* Branch (15 Wall., 460), and it is distinctly stated in Allen *v.* Baltimore and Ohio Railroad Company that this equitable relief has never been denied where the facts warranted it.

The jurisdiction of equity in a proper case is asserted in Cooley on Taxation (2d Edition, p. 761), and notes. The author observes that there is less objection to this remedy when the illegalities complained of affect only the person complaining, and not the whole tax levy (p. 762).

This Court expressly said, in Allen *v.* Baltimore and Ohio Railroad Company, that if the property taxed is not legally liable to taxation, if there is a violation of the Constitution, either in the statute or in its administration, then equity will interfere, and an injunction will be granted. An unconstitutional law will be treated by the Courts as null and void (pp. 315, 316).

All the authorities agree that a court of equity has jurisdiction, and that is the main point here, for if the jurisdiction exists the only question that remains is as to the propriety of its exercise; and as to that there can be no doubt, if it appears that the tax is void because prohibited by the commercial clause of the Federal Constitution. If so flagrant a case would not address itself favorably to the admitted jurisdiction of equity, it would be difficult to imagine a case that would; but the case is plainly within the class defined by the Supreme Court as suitable for the exercise of the jurisdiction of equity.

* It is said in United States vs. Sampergac *et al.*, 1 Hemp., p. 136, at bottom, that "a refusal to deny where the party is legally bound to speak is equal to an admission of the charge made against him. What is admitted need not be proved."

A material fact averred in the bill and not denied or alluded to in the answer must be taken as admitted (Sanborn vs. Adair, 2 Stew. Eq. (N. J.), 338; Lee vs. Stiger, 3 Stew. Eq., 610).

were filed and the decree entered all on the same day. It is evident that the rights of the parties having been substantially decided by the motion for an injunction, both parties treated the answer as admitting the facts alleged in the bill. *

The intention of all parties was to have a final decree entered that an appeal to this Court might be taken as soon as possible.

The answer is, however, a substantial admission of the facts alleged in the bill; for it admits that the Acts of Tennessee apply to the Express Company, and this admission can only have reference to the Express Company, as it is described in the bill of complaint, and the complainant is entitled to read the bill as evidence in his own favor to explain this admission.

1 Dan'l, Ch. Pr., p. 838.

The answer must be taken as admitting that the express company is one operating on certain railroads in the State and engaged in the inter-State commerce, that it also does a local business, but only as an inseparable part and incident of the inter-State business. The general nature of the express business and the manner in which it is conducted is a matter of general knowledge, and as such the Court should take judicial notice of it.

Brown *v.* Piper, 91 U. S., 37.
See also the Express Cases, 117 U. S., pp. 15, 20, 24, 25.

As none of the facts alleged in the bill are denied, the answer as to all those facts can have no greater force as evidence than an unsworn answer. Such an answer does not constitute evidence for the defendants, and the testimony of one uncontradicted witness in support of the bill is sufficient to sustain its allegations.

Patterson *v.* Gaines, 6 How., 588.

As the bill is sworn to positively, and is supported by the affidavit of Mr. Platt that the facts are true within his own knowledge, it is submitted that the cause should not be remanded for such a technical objection. The only result would be to compel the complainant to take proof of facts which are not and cannot be denied.

Third.—*The Act of 1887, imposing a license fee on express companies, was void.*

I.—This is, indeed, practically conceded by the act of 1889, which was intended to accomplish the same object by an amendment which it was supposed would cure the manifest invalidity of the preceding legislation.

II.—The legislation of 1887 declared all express business to be a privilege not to be carried on without license, and it prescribed the amount of the license fee to be paid. It made no distinction between inter-State and foreign express business, and that carried on wholly within the State. The tax was measured by the length of the lines of transportation occupied by the company without regard to whether any part of its line or lines was within the State. No express company could conduct within the limits of the State any business subsidiary to its lines of transportation within or without the State without being subject to the payment of the prescribed license tax. Whether an express company took up and put down a single package within the State was of no consequence; the tax was nevertheless payable.

III.—Express companies are one of the great organs of commerce, and as such they and all their instrumentalities are under the protection of the commercial clause of the constitution. It needs no argument to show that this legislation is a regulation of inter-State commerce, that it is a burthen upon such commerce and might be made effective to destroy it altogether if its validity were admitted in principle. Indeed, argument would necessarily consist of a mere repetition of what has been said over and over again in a long line of decisions of this Court.

Cook *v.* Pennsylvania, 97 U. S., 566.
Gloucester Ferry Company *v.* Pennsylvania, 114 U. S., 196.
Telegraph Company *v.* Texas, 105 U. S., 460.
Picard *v.* Pullman, 117 U. S., 134.
Robbins *v.* Shelby Taxing District, 120 U. S., 490.
LeLoup *v.* Mobile, 127 U. S., 640.
Stoutenburgh *v* Herrick, 129 U. S., 148.
Leisy *v.* Harden, 135 U. S., 100.
Minnesota *v.* Barber, 136 U. S., 314.

Fourth.—*The amendment of 1889 was intended simply as an evasion of the constitutional provision, and did not render the tax valid.*

I.—Nothing is better settled than that, in considering the constitutionality of statutes, this Court, adopting the general canon of construction applied in all cases, looks rather at the object and necessary effect of the statute than at its mere words, and that it will not permit a constitutional provision to be evaded or frittered away by any form into which the Legislature may see fit to cast its enactments. It will go behind the mere form and see the ultimate effect and intent of the act, and will not allow that to be accomplished indirectly which the Constitution says shall not be done directly.

In Cummings *v.* Missouri, 4 Wall., 277, the Constitution of Missouri, adopted after the war, required, as a condition of holding any office, an oath to be taken that the person had never been in armed hostility to the United States, and had never, by act or word, manifested his adherence to the cause of their enemies or his desire for their triumph, or his sympathy with those in rebellion

against the United States, or ever entered or left the State for the purpose of avoiding enrollment or draft in the military service of the United States. Any person unable to take the oath was declared incapable of holding any office, or being an officer or director of any corporation, or acting as a teacher in any educational institution, or preaching or teaching as a priest or other clergyman; and all persons holding such offices at the time of the adoption of the Constitution were required to take the oath within sixty days or their offices became vacated, and they were liable to fine and imprisonment. Mr. Cummings was a priest of the Roman Catholic Church, and was indicted for preaching without taking the oath. The provision was attacked on his behalf as, in effect, a bill of attainder and an *ex post facto* law. It was sought to be upheld as a legitimate exercise of the power of the State to prescribe the qualifications for holding office. But it was held to be a mere evasion of the constitutional provision, and, in effect, a punishment for acts committed before its adoption. This Court said: "Among the rights reserved to the States is the right of each State to determine the qualifications for office and the conditions upon which its citizens may exercise their various callings and pursuits within its jurisdiction. But it by no means follows that, under the form of creating a qualification or attaching a condition, the State can, in effect, inflict a punishment for a past act which was not punishable at the time it was committed. The question is not as to the existence of the power of the State over matters of internal police, but whether that power has been made in the present case an instrument for the infliction of punishment against the inhibition of the Constitution." After considering the effect of an act directly imposing penalties for the same acts as were made the grounds of disqualification, the Court says: "The purpose of the law-makers in the case supposed would be openly avowed; in the case exist-

ing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not with shadows. Its inhibition was levelled at the thing, not the name. It was intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding. * * The framers of the Constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed. To them there is no escape provided. * * * To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition. * * The provision of the Federal Constitution, intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the State is exerted. If this were not so—if that which cannot be accomplished by means looking directly to the end can be accomplished by indirect means—the inhibition may be evaded at pleasure."

In the Bank Tax Case, 2 Wall., 200, the statutes of New York taxed corporations on the actual value of the capital stock, and the Act had been held by this Court to be void so far as the capital of National Banks invested in Government bonds was concerned, the tax being in effect a tax on those bonds. Immediately after this decision the Act was amended, so that banks were taxed "on a valuation equal to the amount of their capital stock paid in, or secured to be paid in." It was held that the amendment did not change the effect. The Court, referring to the provisions of the National Banking Act, said: "The Legislature well knew the peculiar system under which these institutions were incorporated, and the working of it, and when providing for a tax on

their capital at a valuation, they could not but have intended a tax upon the property in which the capital had been invested. We have seen that such is the practical effect of the tax, and we think it would be doing injustice to the intelligence of the Legislature to hold that such was not their intent."

In Guy *v.* Baltimore, 100 U. S., 434, a statute authorized the City of Baltimore to collect wharfage from vessels resorting to, or lying at, landing or transporting goods other than products of the State, on any wharf belonging to the city. In regard to this statute, and ordinances passed in pursuance of it, fixing wharfage rates, this Court said: "The City of Baltimore, if it chooses, can permit the public wharves which it owns to be used without charge. Under the authority of the State it may also exact wharfage fees equally from all who use its improved wharves, provided such charges do not exceed what is fair remuneration for the use of its property. But it cannot employ the property it thus holds for public use so as to hinder, obstruct, or burden inter-State commerce in the interest of commerce wholly internal to that State. The fees which it exacts to that end, although denominated wharfage dues, cannot be regarded, in the sense of our former decisions, as compensation merely for the use of the city's property, but as a mere expedient or device to accomplish by indirection what the State could not accomplish by a direct tax, viz., build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States."

In the case of the State Tax on foreign-held bonds, 15 Wall., 300, where a statute of Pennsylvania taxed bonds of corporations, and required the corporation to pay the tax and withhold it from the interest on them as it fell due, the Court held the law invalid as regards bonds held by non-residents of the State, they not being subject to its jurisdiction and the debt of the corporation not being property within the State, the Court saying

that it was one of the many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than the arbitrary seizure of the property.

In Kilburne *v.* Thompson, 103 U. S., 168, Congress having appointed a committee to investigate some of the affairs of Jay Cooke & Co., on the ground that the Government was a creditor, and that the Courts were powerless, by reason of certain settlements that had been made, to afford adequate redress, the Court held that it would scrutinize the purpose of the investigation to see whether it fell within the legitimate exercise of legislative powers, and having found that the inquiry was judicial in its nature, and not in aid of legislation, an order punishing a witness for contempt in refusing to answer questions was void, and afforded no protection to the sergeant-at arms for arresting the witness.

The proposition that the Courts are not concluded by the form of the act or its declared purpose, but will scrutinize it to see if it, in effect, violates any constitutional provision, is forcibly maintained in a well considered case in the New York Court of Appeals.

Matter of Jacobs, 98 N. Y., 98.

An act was passed entitled "An Act to Improve the Public Health by Prohibiting the Manufacture of Cigars and Preparation of Tobacco in any form in Tenement Houses, and Regulating the use of Tenement Houses in certain cases." It prohibited the manufacture of cigars on any floor of a tenement house if any part of the floor was used for the purpose of living, sleeping, cooking or doing any household work. The Court pointed out that the Act interfered with the profitable and free use of his property by the owner or lessee of a tenement house who was a cigarmaker and in a legal sense deprived him of his property—that if the Legislature could prohibit one use, it could prohibit

all; that while the Legislature could pass police laws, it could not, under the guise of such laws, evade constitutional provisions. "Under the mere guise of police regulations personal rights and private property cannot be arbitarily invaded, and the determination of the Legislature is not final or conclusive. If it passes a law ostensibly for public health and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the Courts to scrutinize the Act and see whether it really relates to, and is convenient and appropriate to promote the public health. It matters not that the Legislature may, in the title to the Act or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the Courts, and they must yet determine the fact declared and enforce the supreme law. * * Even the power of taxation, which is one of the broadest possessed by the Legislature, is not without its limitations, and its action in reference thereto may be scrutinized by the Courts; and that which is done under the guise of taxation may be condemned as sheer spoliation and confiscation without due process of law." The Act was held to be unconstitutional as not being appropriate to promote public health.

The legislation in New York State, which was reviewed in the Passenger cases, 7 How., 283; Henderson *v.* Mayor, 92 U. S., 259; and People *v.* Compagnie Transatlantique, 107 U. S., 59, affords another illustration of the same proposition. The Health Laws of New York required every vessel bringing passengers to the port of New York from foreign countries to pay a tax of $1 per passenger. The money was to be applied to the support of the Marine Hospital at Staten Island, which was under the control of the Health Commissioners. The act was held to be invalid in the Passenger Cases as being a direct tax on the right of transporting passengers from foreign

countries. The act was thereupon amended, and it was provided that the masters of vessels should give a bond in the sum of $300 for each passenger that he should not become a charge on the county for four years, with the privilege of commuting by paying $1.50 for each passenger. Speaking of this act the Court said, in Henderson *v.* The Mayor: "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect, and if it is apparent that the object of the statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, it is as much a tax on the passengers or on the vessel for the right of landing them as was the statute held void in the Passenger cases. To require a heavy and almost impossible condition for the exercise of this right, with the alternative of the payment of a small sum of money is, in effect, to demand payment of that sum. * * * It is a law in its effect and purpose, imposing a tax on the owner of the vessel for the privilege of landing in New York passengers transported from foreign countries."

In People *v.* Compagnie Generale Transatlantique an act was passed providing for the inspection of passengers arriving in New York from foreign ports, and three days later another act was passed entitled "An Act to Provide Money for the Execution of the Inspection Laws," and requiring each passenger to pay a tax. But it was held that the act went far beyond the proper scope of inspection laws and was in effect a tax upon inter-State commerce.

In Mugler *v.* Kansas, 123 U. S., 623, it was said: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature has

transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

II.—As already stated, the amendment of 1889 involves an admission that the Act of 1887 was unconstitutional. The object of the amendment was simply to evade the constitutional provision, and, by bringing the statute into formal compliance with the decisions of this Court, to exact the same tax under a different name. The *character* of the tax is in no way changed. It is not a tax on property having a *situs* within the State, nor on the earnings from local business. Its amount is not determined by the extent of the local business, but by the length of lines employed in the general inter-State business. Its amount is the same if one package or a million be carried between two points within the State, and whether the earnings from local business be fifty cents or a hundred thousand dollars. It is a pure license tax for the privilege of carrying on the express business; and while, in terms, it is said to be for the privilege of carrying on the local business, this is simply a device to evade the Constitutional provision, for the Legislature could not but have known that from the nature of the business the express companies were obliged to do a local business as well as an inter-State business. Moreover, it will be noticed that the tax, both before and since the amendment, is limited to express companies doing business on railroads and steamboats. But these are the express companies which carry on an inter-State business, and the only ones which do so; so that the tax is expressly limited to those companies engaged in inter-State commerce.

Fifth.—*The State cannot exact a license tax for carrying on domestic commerce, if any part of the burden of such a tax falls on inter-State commerce.*

It may be urged that there is a commerce wholly internal to the State which the State may regulate at its pleasure, and for the conduct of which it may demand any license tax it deems proper. Assuming that the Act is not a mere device to exact a tax from those engaged in inter-State commerce, it is still true that if the burden of the tax in any degree falls upon the inter-State commerce it is void.

The power granted to Congress to regulate commerce is supreme; so far as the transportation of articles from State to State is concerned it is also exclusive. The absence of legislation on the subject is a declaration on the part of Congress that such transportation shall not be burdened by State exactions, and the States, in the control and regulation of their local affairs, must see to it that they do not impose any burden upon inter-State commerce. Legislation is not necessarily valid because it operates on something of which the State has exclusive control. It must also be so restricted that it does not in any part invade the province over which Congress has exclusive control. In Henderson *v.* The Mayor, *supra*, where the statute before the Court was claimed to be a legitimate exercise of the police power, it was said:

"Whatever the nature and extent of the police power, no urgency for its use can authorize a State to exercise it in regard to a subject matter confided exclusively to Congress. * * Whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the States."

In Fargo *v.* Michigan, 121 U. S., 230, it was said that an act which taxed inter-State commerce was

not made valid by including within its provisions subjects within the domain of the State.

In Railroad Co. *v.* Husen, 95 U. S., 465, a statute of Missouri prohibited the importation of Texas cattle into the State between March and November. The Act had been passed to prevent the spread of disease among cattle. But it was held to be unconstitutional, as being an absolute prohibition of inter-State commerce during a portion of the year, and beyond the legitimate exercise of the police power, the Court saying, "Neither the unlimited power of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the constitution."

In Phila. S. S. Co. *v.* Penn., 122 U. S., 345, it was said, "The corporate franchises, the property, the business, the income of corporations created by a State, may undoubtedly be taxed by the State; but in imposing such taxes care must be taken not to interfere with or hamper directly, or by indirection, inter-State or foreign commerce."

In Gloucester Ferry Co. *v.* Penn., 114 U. S., 196, the ferry company, a New Jersey corporation operating a ferry between New Jersey and Pennsylvania, leased a wharf in Philadelphia, at which it received and landed passengers and freight. The State of Pennsylvania taxed it on its entire capital stock. It was urged, in support of the tax, that part of its business was transacted in Philadelphia, and the company was as much dependent upon that place as upon its wharf in New Jersey; that it could only lease its wharf by permission of the State of Pennsylvania, "and was dependent equally, not only for its business, but its power to do business, upon both States, and might, therefore, be taxed by both."

But it was held that the corporation, being engaged in inter-State commerce, could not be

excluded from the State, that while the State might tax the company's lease of the wharf as property having a *situs* in the State, it could not tax it for the privilege of receiving and landing passengers at Philadelphia, as that was a necessary incident of the inter-State commerce, and so exempt from taxtion by the State.

In Bowman *v.* Chicago, &c., Ry. Co., 128 U. S., 465, a statute of Iowa prohibited common carriers from bringing intoxicating liquors into the State from any other State without first being furnished with a certificate from the county auditor that the consignee was authorized to sell intoxicating liquors. The statute was not intended as a regulation of commerce, but in furtherance of the general policy of the State to restrict the use of liquors and protect its citizens from the evils of intemperance; but it was held that liquors were an article of merchandise, and the State had no power to prevent their importation from another State; that the Act was, in effect, a regulation of commerce, and as such was void. The authorities are reviewed at length, and the case affords another illustration of the doctrine that the State cannot, in the exercise of those powers which are reserved to it, invade the domain of the powers given to Congress, but that where the two conflict the former must yield.

In the late case of Leisy *v.* Hardin, 135 U. S., 100, where the statute of Iowa probibited the sale of intoxicating liquors within the State, it was held that, while the State could in the exercise of its police powers restrict or prohibit the traffic in liquors between its own citizens, it could not so exercise this power as to restrict inter-State commerce; that liquor imported from another State remained a subject of commerce so long as it was in the hands of the importer in the original package, and that until mingled with the general mass of property in the State by sale, the traffic in it could not be controlled by the State.

The question has been exhaustively considered in

the late cases of Minnesota *v.* Barber, 136 U. S., 104, and Swift *v.* Sutphen, 39 Fed. R., 630.

In those cases a statute of Minnesota provided that meat should not be sold in the State unless the animals were inspected by State inspectors within twenty-four hours before they were slaughtered. The act was intended as a protection of public health, but it was held that its practical effect was to discriminate against meat from animals slaughtered in other States, and was therefore in effect a regulation of commerce. The proposition is there again asserted and enforced, that it is in all cases the practical effect and operation of a statute which the Court will consider and not its form; that neither the police power of a State, nor its right to pass inspection laws nor any other of its powers can be so exercised as to amount to a regulation of inter-State commerce.

Sixth.—*The tax imposed by the Act of 1889 is a burden on the inter-State commerce carried on by the Express Company.*

I. In Leloup *v.* Port of Mobile, 127 U. S., 641, a license tax was exacted from the Western Union Telegraph Co. by the City of Mobile, and it was urged that a portion of the company's business was internal to the State of Alabama, and therefore taxable by the State; but the Court said, "That fact does not remove the difficulty. The tax affects the whole business without discrimination." The same remark is applicable to the case at bar. Notwithstanding the amendment of 1889, the tax affects the whole business of the company, inter-State as well as domestic. It has no relation to the amount or value of the company's property in the State, or to the manner in which that property is employed. It is not based on the amount of busi-

ness done within the State, or on the revenues from that business. Nor is it made payable solely from those revenues, but is made payable from any and all property or revenues of the company. It must be paid if a single package is taken up and delivered within the State, and the *rate* of taxation is regulated by the length of lines employed in inter-State business, and not at all by the value of the package, the cost of transportation or the distance carried. It is a confusion of ideas to say that a tax which is estimated at a gross sum, even if in terms exacted only for carrying on local business, falls solely on the local business. A tax on business, to fall solely on that business, must, like a tax on property, bear some relation to the amount and extent of that business, and be payable from its proceeds. But if placed at a gross sum it is a tax on the instrumentality by which the business is carried on, and if that instrumentality is one of those engaged in inter-State commerce, the tax is a tax on such commerce.

II. It appears from the record that the local business forms but an insignificant part of the total business done by the company at its offices in Tennessee; that the main business of the company is inter-State commerce, and the local business is but an incident to the inter-State business, but that at the same time there is a practical necessity for carrying on this local commerce, arising from the established methods of doing the express business, the importance of the local commerce to the public and to the railroads on which the company is dependent for its facilities, and the impossibility of separating it from the inter-State commerce. It also appears by the record that the company was at the time this tax was imposed, under a contract to carry on the local business which has not yet expired, and that it must continue to do so or violate its contract.

Theoretically, it might be possible for the express company to abandon its local business, and so escape the tax; but, practically, that cannot be done, and the Court must consider the question solely from its practical side, and determine the validity of the statute according to its effect upon the established methods of doing the business. Such was the view taken in the decision below, and in all the cases where the question has been considered.

Henderson *v.* The Mayor, *supra.*
Railroad Co. *v.* Husen, *supra.*
Leloup *v.* Mobile, *supra.*
Barber *v.* Minnesota, *supra.*
Swift *v.* Sutphen, *supra.*
Walling *v.* Michigan, 116 U. S., 446.

It was held in Ratterman *v.* Western Union Tel. Co., 127 U. S., 411, that where the earnings of the domestic business could be separated from the earnings of the inter-State business, it was in the power of the State to tax the former, and it follows from that decision that where such practical separation of the two classes of business cannot be made, there is no power in the State to impose a tax. In the case at bar the tax is not imposed on the earnings, but on the occupation of doing an express business; that business is conducted as a unit, and the Legislature cannot, by any language it may adopt in the statute, effect a separation in law which cannot be made in practice.

III. The case of Hall *v.* DeCuir, 95 U. S., 485, is instructive, and in its facts closely analogous to the case at bar. A statute of Louisiana provided that "all persons engaged within this State in the business of common carriers shall have the right to refuse to admit any person to their cars," &c., when such person shall refuse to pay, &c,, and to remove those violating the rules, "provided said rules and

regulations make no discrimination on account of race or color." The plaintiff, a colored woman, took passage between New Orleans and Hermitage (a place in Louisiana), on a vessel engaged in inter-State commerce, and was excluded from the cabin on account of her color. She sued for damages, and the defendant urged that the act was a regulation of commerce.

Waite, C. J., referring to statutes governing the use of turnpikes, ferries, bridges, &c., said: "By such statutes the States regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions, and over which they have exclusive governmental control, except when employed in inter-State commerce. As they can only be used in the State, their regulation for all purposes may properly be assumed by the State, until Congress acts in reference to their foreign or inter-State relations. * * * State legislation which seeks to impose a direct burden upon inter-State commerce or interfere directly with its freedom does encroach upon the exclusive power of Congress. The statute now under consideration occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within; while it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State or taken up within to be carried without, cannot but affect, in a greater or less degree, those taken up without and brought within. * * It was to meet just such a case that the commercial clause in the Constitution was adopted. * * If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not

but be productive of great inconvenience and unnecessary hardship."

Clifford, J., in a concurring opinion, pointed out that Congress having, under its power to regulate commerce between the States, prescribed the terms and conditions on which vessels could be licensed and enrolled for the coasting trade, no State can impose other conditions; that vessels so enrolled can lawfully touch at intermediate ports to discharge passengers and cargo, and that the fact that they do so does not change the character of the trip or diminish the right of the vessel to enjoy all the privileges of a vessel engaged in inter-State commerce. He then said: "Nor does the fact that the plaintiff expected to leave the steamer at a landing in the same State enlarge her right of accommodation or augment in any respect the obligations of the steamer as a public carrier, for the reason that the steamer sailed throughout the whole trip under her coasting license, and her rights and privileges, duties and obligations must be ascertained and defined by the regulations prescribed by the Acts of Congress. Commercial regulations of the kind cannot be effectual to accomplish the object for which they were required and designed to effect, unless it be held that they extend to the entire voyage as well that portion of it which is in the State where the voyage began, as that which extends into another State, as the whole is performed under the coasting license founded in the Acts of Congress passed to regulate such commerce and navigation."

It will be noticed that in this case the statute only purported to affect that part of the voyage which was carried on within the State, and that the passenger was pursuing a journey wholly within the State, but it was held that the commerce in the State was a part of the whole commerce carried on by the vessel; that the regulation of the part within the State necessarily affected the whole

business and amounted to a regulation of inter-State commerce.

IV.—The constitutional provision is directed against the imposition of burdens on inter-State commerce, and if the act before the Amendment of 1889 was void, it could only be made valid by an amendment which would relieve the commerce from the burden of the tax. But if the inter-State and local commerce are practically a unit, the amendment of 1889 affords no relief. It makes no difference to the company or its business whether it is paid under the former or the latter law—whether it is paid in terms as a tax on inter-State or local commerce. It must still be paid, and the burden is as heavy in the one case as in the other.

V.—It is shown in the record that the tax is more than five times the whole amount of net earnings from the local business. Four-fifths of the tax must be paid from the inter-State earnings. A State can tax the gross earnings from local business; but if the tax were placed at 200 per cent. of those gross earnings, it would surely be void. And it cannot be any the less void, because a gross sum exceeding many times the whole net earnings is exacted, when, as in this case, the company cannot relieve itself from the tax by abandoning the business.

VI.—Nor can it be said that the tax operates but indirectly and remotely upon the inter-State commerce. The State may regulate those instruments of commerce which are purely local in their operation, such as wharves, bridges, ferries; it may tax property imported from other States, and which has become mingled with the general mass of property in the State, provided no discrimination is made against the products of other States; it may pass quarantine and police laws; it may also tax

occupations and pursuits not directly connected with inter-State commerce.

County of Mobile *v.* Kimball, 102 U. S., 691.
Brown *v.* Houston, 114 U. S., 622.
Morgan *v.* Louisiana, 118 U. S., 455.
Robbins *v.* Shelby Co., 120 U. S., 490.

And it was held in Louisville, &c., R. Co. *v.* Mississippi, 133 U. S., 587, that a law requiring railroads to provide equal but separate accommodations for white and colored persons, when limited exclusively to persons travelling between points in the State, only indirectly affected inter-State commerce, as its provisions would be fully complied with by adding a separate car for colored persons to its trains on entering the State.

But these cases bear no analogy to the case at bar. The distinction between laws which directly affect inter-State commerce, and those which affect it indirectly, is pointed out in Sherlock *v.* Alling, 93 U. S., 99. There an act giving damages for negligence causing death, was held to apply to a collision between two vessels engaged in inter-State commerce on the Mississippi River, the Court saying: "It will be found that the legislation adjudged invalid, imposed a tax on some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuit. * * * In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels or conditions for carrying it on. * * * General legislation, prescribing the liabilities or duties of citizens of a State without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in inter-State commerce. * * * In conferring upon Congress the regulation of commerce it was never intended to cut the States off from legislating on

all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country."

In Smith *v.* Alabama, 124 U. S., 466, a statute which prescribed the qualifications of locomotive engineers, and was properly adapted to securing competent persons, was held to be valid, even as to those engaged in inter State transportation, the Court saying that the entire body of law regulating in general the relative rights and duties of persons within the State, without regard to pursuits, was subject to State control—that if competent to administer justice between persons engaged in inter-State commerce, the State could also 'prescribe the precautions and safeguards foreseen to be necessary and proper to prevent, by anticipation, those wrongs and injuries which, after they have been inflicted, it is admitted the State has power to redress and punish.'

But a tax on an occupation stands on a different basis from taxes on property, or laws regulating its use or prescribing the duties and liabilities of citizens to each other. It is something directly taken from the person or corporation following the occupation, and not from specific property. Although imposed in terms only upon one part of a business, if not graduated according to the extent of that business, it must fall directly on the whole business, because from the very statement of the case its payment must be made from any property or revenues, without regard to their source, and, in any event, whether the business, in terms taxed, yield sufficient to pay the tax or not.

Seventh.—*The local business, as a necessary incident of the inter-State business, is free from State control.*

I.—In Pensacola Tel. Co. *v.* West. Union Tel. Co.,

96 U. S., 1, the State of Florida had granted to the plaintiff the exclusive right to maintain and operate a telegraph within certain counties of the State; Congress had authorized the defendant to operate a telegraph over any of the post roads of the United States, and it had acquired, by contract with a railroad company in Florida, the right to build a telegraph line along its road. It was held that the telegraph being one of the instruments of inter-State commerce, the Act of Congress was a legitimate exercise of its power to regulate that commerce, and the Statute of Florida, being in conflict with the Act of Congress, was void.

In California *v.* Pacific Railroad Co., 127 U. S., 1, 39, it was held that Congress, under its power to regulate commerce between the States, could incorporate the Central Pacific Railroad Company and authorize it to build and operate its road in the State of California, and that the franchises so granted by Congress were not subject to taxation by the State.

In Cherokee Nation *v.* Kansas Railway Co., 135 U. S., 641, 657, it was held that under its power to regulate commerce with the Indian tribes, Congress could authorize the defendant, a corporation of the State of Kansas, to build a road through the Indian Territory.

There is no intimation in any of these cases that the corporation would be restricted in the exercise of the franchise to inter-State commerce, or that the right to do a local business was subject to State control. As was pointed out by Judge Field in Pensacola Tel. Co. *v.* Western Union Tel. Co., *supra*, if Congress has power to authorize a corporation to enter a State and there carry on the telegraph or railroad business as a branch of inter-State commerce, all that is necessary to the beneficial and profitable enjoyment of the grant will go with it, including the right to carry on local business, and that such local business will be free from the control of the State.